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REPORTS
OF
CASES ARGUED AND DECIDED
IN THE
CIRCUIT COURT OF THE UNITED STATES,
See - 112 p. 1/5 **FOR THE**
SEVENTH CIRCUIT.

BY JOHN McLEAN,
CIRCUIT JUDGE.

VOL. III.

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CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—JUNE TERM, 1842.

HALL v. SINGER AND OTHERS.

A writ, by virtue of which a bail bond was taken, will not be set aside on motion, after judgment in the original action and suit on the bond.

A plea cannot contradict the record.

Errors in the original suit should have been corrected as they occurred, or by writ of error.

It is too late to correct such errors by plea, or after action brought on the bail bond.

Mr. *Butterfield* appeared for the plaintiff, and Messrs. *Logan & Goodrich*, for the defendants.

OPINION OF THE COURT.

THIS is an action on a bail bond, taken by the Marshal, in October, 1840. A judgment was obtained in that suit, at December term, 1840. And a motion is now made to set aside the capias in that case, on the ground that no affidavit was made, as required by the statute of Illinois, to hold to bail.

If the irregularity exist, it is too late now to correct it by motion. The case has passed into judgment, and it can only be reviewed and reversed by a writ of error, if the amount in controversy shall authorise such writ.

The declaration in this case sets out the writ, the indorsement on it, and the bail bond in the usual form. To

this the defendants plead, 1st. There was no affidavit on which the writ could issue. 2d. That there was no writ; and, 3d. That there was no indorsement upon it, as the statute requires.

The plaintiff demurred to the plea, and assigned as causes of demurrer: 1st. That the plea is double. 2d. That it puts in issue matters of record and of fact. 3d. That the plea should have concluded to the country. 4th. That the bail bond is a recognizance, and that defendants cannot go behind it. 5th. That the bail cannot plead any irregularity in the proceedings of the former case.

By their plea the defendants seek to take advantage of a defect in the affidavit, on which the capias was issued, and by virtue of which the bail bond under consideration was taken. There was in fact an affidavit, a writ, and an indorsement of it; and we think, that for any formal defects in any of these requisites, objection cannot be made to a suit on the bail bond. The bond is in the nature of a recognizance, and no error in the proceeding prior to it, can be pleaded to an action on the bond. Advantage should have been taken of the alledged errors, at the time they occurred, by a motion to set aside the affidavit, the writ, or the indorsement, as the correction of the error might require.

For any defect in the writ, oyer should have been prayed of the writ, and the defect specially stated. A plea cannot contradict the record, and this is done by the plea, in this case, in every essential particular. The demurrer to the plea is sustained, and judgment.

JANUARY v. DUNCAN.

In an action against the assignor or guarantor of a note, the declaration must allege a demand on the drawer of the note when it became due.

In all cases where the undertaking is collateral, a demand and notice are essential.

Messrs. *Logan & Lincoln* appeared for the plaintiff, and Mr. *Chickering*, for defendant.

OPINION OF THE COURT.

THIS action is brought upon a note given by W. B. Archer to Joseph Duncan, for four thousand dollars, payable five years from the 5th of January, 1837. This note the defendant assigned to the plaintiff, the 12th of July, 1839, and guarantied the payment thereof.

The declaration alleged no demand on the drawer at the maturity of the note, and on this ground the defendant's counsel demurred.

There is nothing in the guaranty of this assignment which excuses a demand on the drawer of the note when due. The undertaking of Duncan was collateral, to pay the money when due, if Archer, the drawer of the note, should fail to pay it; and in all such cases a demand and notice are essential to the maintenance of the action against the assignor or guarantor.

Where there is a special guaranty in the note, it is a special contract between the guarantor and guarantee, and it does not pass to the assignee of the note; in such case, the action must be brought between the parties to the guaranty.

The demurrer is sustained; but leave is given to amend the declaration.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—JULY TERM, 1842.

DOE EX DEM GAULT ET AL V. McMILLAN ET AL.

A survey after the entry is withdrawn, does not, under the act of Congress of 1807, prevent the location of the land surveyed, by another warrant.

That act refers to a subsisting survey, which must be founded on an entry, though the survey may not have been made conformably to entry.

A survey made without an entry is of no validity, nor is the survey valid, after the withdrawal of the entry.

The withdrawal of an entry by a person wholly unauthorised to do so, does not affect the rights of the persons claiming under the entry.

But if the act of withdrawal be unauthorised, any subsequent sanction of it makes the act valid.

Claiming the land, and exercising acts of ownership over it, which has been located by the withdrawn warrant, is such an act.

Mr. Scott and *Mr. Green*, appeared for the plaintiffs, and *Mr. Wright* and *Mr. Thurman* for defendants.

OPINION OF THE COURT.

THIS is an ejectment to recover possession of two thousand acres of land, in the Virginia military tract, in Ohio. The plaintiffs claim under a patent dated the 15th of May, 1840. The patent under which the defendant claims, bears date the 11th April, 1815. The entry of the plaintiffs was made the 17th August, 1787, and was surveyed the 24th August, 1797. That of the defendants was made in 1812.

As the defendants claim under the elder patent, they

must succeed, unless their patent shall be invalidated. The plaintiffs insist, that the patent of the defendants is void, under the act of 1807, as it covers land which had been surveyed under their prior entry. The 1st section of the act of the 2d of March, 1807, provides, "that no locations, in the above tract, shall, after the passing of this act, be made on tracts of land for which patents had been previously issued, or which had been previously surveyed; and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void."

Now as the plaintiffs' survey was made long before the entry of the defendants, it follows that the defendants' patent is void, under the above act, unless it shall be shown that the plaintiffs' survey was not a subsisting one, at the time of the adverse entry; and the defendants insist, that the plaintiffs' survey was abandoned by a withdrawal of the entry.

It seems the plaintiffs' entry of nineteen hundred acres was withdrawn the 22d November, 1804, and re-entered on the same day on the same land; and afterwards the entry for two thousand acres was withdrawn, and entered on a different tract. The land covered at first by this entry, is the land subsequently located by the defendants, and which gives rise to the present controversy.

The act of 1807 must have meant a subsisting survey, and not one made without an entry, or after the withdrawal of an entry. A survey in either of these predicaments is, in every sense, inoperative. A survey without an entry to support it is void, and so is a survey which has been abandoned by the withdrawal of the entry. And this case must turn upon the act of withdrawal. If that act were done by a person wholly unauthorised, the withdrawal should not prejudice the rights of the plaintiffs, unless by subsequent acts they sanctioned it.

Doe ex dem Gault v. McMillan and others.

Now there is no satisfactory proof as to the power of the person making the withdrawal. He was authorised to act in the premises by the attorney of all the heirs of Gault except one; but in this power there was no authority of substitution. But this point is of less importance, as it appears that the land located by the withdrawn warrant has been claimed by the plaintiffs, and they have exercised acts of ownership over it. This is conclusive against their right to the land in controversy.

They cannot claim under both entries. By claiming under the new entry, they not only indirectly sanction the act of withdrawal, but they show a determination to follow the warrant under the new entry. It is said this was done by the heirs, under an ignorance of their rights. But the facts were known to their agent, who, in making the withdrawal, it is admitted, acted bona fide, and with a desire to promote their interests. This being the case, the sanction given to his acts subsequently, by claiming the land, paying taxes for it, &c., goes to conclude the plaintiffs from the claim now made.

On this instruction, the jury found the defendants not guilty. Judgment.

PECK AND WIFE v. NEIL.

A stage proprietor is responsible for the skill and prudence of his drivers.

He is also bound to procure good stages, harness, and well broke horses.

If, for want of such preparation, an injury is done to a passenger in the stage, the proprietor is responsible. Or if the drivers do not act with skill and prudence in driving the stage.

Although the accident may have occurred through the recklessness of the driver of another stage, who may be liable, and also his employers—yet if the driver of

Peck and Wife v. Neil.

the stage to which the accident occurred be in any respect wanting, in the exercise of skill and prudence, his principals are liable.

Damages will be assessed for the injury received.

Where there has been great recklessness by the driver, exemplary damages should be given.

Messrs. *Goddard* and *Vinton* appeared for the plaintiffs, and Messrs. *Ewing*, *Swan* and *Stanbury* for defendant.

OPINION OF THE COURT.

THIS action is brought for an injury done the plaintiff's wife, by the overturning of the stage through the carelessness of the driver, the defendant being the proprietor. The plea of not guilty was filed by the defendant.

In the summer of 1840, there were two stage lines on the route between Marietta and Zanesville, Ohio. One carried the mail. Neil's line was run in opposition to the mail line. On the 2d of August, Peck and wife took Neil's line of stages at Zanesville, for Marietta. The stages left Zanesville at about the same hour. The accommodation sometimes passed the mail stage whilst detained at a post-office. The horses in both lines were driven rapidly, often at their full speed, against the remonstrances of the passengers in Neil's line. When within about six miles of Marietta, the mail stage overtook the other about a quarter of a mile before they reached a hill; the driver of the mail requested the other driver to give half the road and he would pass him. The driver answered, that he was not so anxious for a race as that. The mail driver then turned his horses to the right, whipped them, halloed, and this started the horses in the other stage, which had been moving rather slowly. The horses in the accommodation stage did not go fast, but jumped; the driver struck the off-wheel horse, in order, as he alleged, to bring him nearer the tongue, and give half the road to the other stage. The driver says he pressed the lever, and Donaldson, who sat

with him, raised the reins, and, with the driver, pulled them. The other coach inclined to the left, until the wheel of the mail coach locked in the fore-wheel of the other stage, broke its double-tree, and threw the stage and horses over a precipice, which severely injured Mrs. Peck. Several physicians state that her health, by this injury, has been permanently impaired, her arm disabled, and several of them say that the injury has made her life uncomfortable, and that it will, in all probability, shorten her life.

There was evidence conducing to show a concerted arrangement between the two drivers in regard to racing, and it was fully proved that the horses in both stages were driven over the greater part of the route in a most rapid and reckless manner, against the remonstrance of the plaintiff, Peck. One of the passengers, occasionally, rather encouraged the driver.

On the evidence, the Court charged the jury, that to exonerate the defendant from liability, he must show that every precaution was used by his agent to prevent the injury which occurred; that every omission of duty by the driver, which in any degree increased the risk of the passengers, subjected the defendant to damages for an injury done them; that although the upsetting of the stage may have been caused immediately by the driver of the mail stage, for which he and his employers were liable to damages, still if Neil's driver, under the circumstances, did not use all the means which a skilful and prudent driver could and would have used to prevent the injury done, the defendant is liable.

Every person who establishes a line of stages for the conveyance of passengers, and who holds out inducements to persons to travel in his stages, for which a compensation is charged, is bound to have skilful and prudent drivers, good coaches and harness, and well broke horses; and the utmost skill and prudence of the driver, under the circum-

stances, must be exercised to avoid accidents. This, and nothing short of this, will exonerate the defendant from liability to damages in this case.

If the driver of the defendant's stage did not say or do any thing to provoke a reckless competition with the driver of the mail stage, and if, on the contrary, he evidently sought to avoid such competition, and if, when the driver of the mail stage attempted to pass him, he did all that could be reasonably expected from a skilful and prudent driver to prevent the upsetting of his stage, the defendant is not liable, however serious the injury may have been to the wife of the plaintiff. The culpability and utter recklessness of the driver of the mail stage are clear, and whatever may be the result of this case, he and his principals should be made to feel that they cannot, with impunity, sport with the lives of passengers in their own or an opposition line.

The damages are to be measured mainly by the injury done. Where a case is extremely aggravated by the recklessness of the driver, a jury will feel authorised to assess exemplary damages, to prevent such conduct in future. But, where these circumstances do not exist, and the driver, though somewhat in fault, has generally conducted himself well, the jury will feel inclined to give no more damages than may repair the injury received. These are to be ascertained by the expenses incurred, the loss of time and the suffering which has been endured.

The want of skill of the driver may be shown, at the time of the accident, or at any prior time; but his good or bad conduct can only be looked at, at the time the accident occurred, or as connected with the accident.

The enterprise and great efficiency of the defendant, as a stage proprietor, is known and acknowledged. His exertions have done much to facilitate travelling throughout Ohio and other states. But, still, this does not excuse

William L. Peck, by Hobby, his next friend, v. Neil.

him, where one of his agents has been the means of inflicting an injury upon a passenger in the stage.

The jury returned a verdict for the plaintiffs, and assessed their damages at five thousand dollars.

Judgment was entered on the verdict.

WM. L. PECK, BY HOBBY, HIS NEXT FRIEND v. NEIL.

THIS action was brought by the plaintiff for an injury done him by the upsetting of the stage, at the time described in the above action of *Peck and Wife v. Neil*. The evidence was substantially the same, as to the conduct of the driver, and the upsetting of the stage. The case was submitted to the same jury, and the extent of the injury was the only difference between this and the other case. There was much difference of opinion among the witnesses as to the extent of the injury; some of them stating that the injury received by the plaintiff, on the head, had materially affected his mind. Others did not agree with this, and considered the injury as not so serious.

The court instructed the jury, as in the other case. They found for the plaintiff, and assessed his damages at twenty-five hundred dollars. Judgment was entered on the verdict.

PIATT v. OLIVER, WILLIAMS ET AL.

The active partner of a mercantile partnership may transfer its funds,

Real estate purchased by the partnership is liable for its debts.

But the acting partner cannot transfer the real estate of the partnership; the same as personal.

In Chancery such real estate, for the purposes of paying the debts of the partnership, is considered as personal property.

But the conveyance of the real estate of the firm, must be made as the statute requires.

On the decease of one of the partners, his interests descends to his heirs at law, subject to the debts of the partnership.

A partner by failing to contribute his share of the partnership fund, does not, in ordinary cases, forfeit the interest which he already has in the firm.

And this is especially the case where no extraordinary emergency exists requiring such payment.

A decree may be made as between defendants. The Court can only decree as between parties to the suit, but in equity it is not essential, as at law, that the parties litigant should all be on opposite sides of the case.

Where a trustee disposes of the trust property the *cestui que trust* may claim the thing received, if it can be identified.

And this may be done, although the property received may have become greatly increased in value.

If the present value be the result of skilful labor, this may not be the case.

Where an election is necessary, the parties to the bill praying a specific relief, must be considered as having made it.

A trustee may convey his own interest, though the assignment may not convey the interests of his *cestui que trusts*.

The warranty of the ancestor does not bind the heir, where the right does not vest before the fall of the warranty.

A warranty, with assets does bind the heir, and is a good plea in a *formadon*.

The heir is never bound by a warranty unless the ancestor was bound by it.

A man cannot bind his heirs to pay a sum of money unless he is himself bound to pay it.

The old common law warranty if not in form, in effect, has been superseded by covenants real.

ROBERT PIATT v. OLIVER AND WILLIAMS, AND OTHERS.

At December term, 1840, the main principles of this case were considered and decided in the opinion then given. Whether relief to the complainant shall extend to lots

numbered one and two, or be limited to the tracts given in exchange for those lots, and which were subsequently purchased by Oliver, was reserved for future decision. An interlocutory decree was entered, directing accounts to be taken, &c., and the reports of the masters being now before the Court, the case stands for a final decree.

The counsel who now appear for the defendants did not argue the case at the former hearing, and they have been indulged with a re-argument of the whole cause. This course has been recommended, by the great amount of property and the numerous and important principles involved in the decision. But zealous, searching, and able as the arguments have been, on the maturest consideration they have failed to convince the court of any material error in their former views. Among the many points made in the argument, three only will be now considered. These were not raised, or not fully discussed, in the former argument.

1. That the land held by the Port Lawrence Company must be considered as personal property; and as such was liable to be sold by Baum, the principal agent.

2. That the negligence of the complainant worked a forfeiture of his interests.

3. That no decree against Oliver and Williams can be entered in favor of their co-defendants.

That the active partner of a mercantile partnership may transfer its funds placed in his hands, of what character soever they may be, is not doubted; and that real estate, purchased for the purposes of the partnership, is liable for the debts of the concern, is equally clear. But, from these principles, it does not follow that the acting partner may transfer the real estate of the partnership, the same as personal. And this is the doctrine for which the defendants' counsel contend.

They rely upon the case of *Sumner v. Hampson*, 8 Ohio

Rep. 364, in which the court say: "In the earlier stages of the common law, no proper partnership in lands could, subsist; but, as social arrangements became more complex, land was necessarily used in partnership purposes, firstly as auxiliary to the general objects of the association, or received for debts, and more lately as direct capital stock. The cases cited in the argument show, that the same rules which affect chattels have gradually been extended to lands held for partnership purposes; that wherever partners manifest their intention to hold lands as partnership stock, either by express convention or by their course of dealing, it will be treated as such, in all respects, by courts of equity."

The conveyance of real property is regulated by statute, and also its descent; and neither of these modes is affected by any general law of partnership. Although lands belonging to the partnership may be liable for its debts, yet they descend to the heir at law, and do not go to the executor. Neither in their transfer nor descent are they regarded as personal property; but still, in equity, they are considered as liable for the debts of the partnership, and are applied as the personal property of the firm.

Mr. Collyer, in his late work on Partnership, page 76, gives the following as the result of the reported cases on this point: "Upon the whole, therefore, the better opinion seems to be, that although the legal estate in freehold property, purchased by partners for the purposes of their trade, will go in the ordinary course of descent, yet the equitable interest in such property will be held to be part of the partnership stock, and distributable as personal estate." To hold that a partner in lands could sell and transfer them as he could a bolt of muslin, would disregard the law and its policy, and would introduce great confusion and uncertainty in land titles.

It is not perceived that the authorities cited can have any bearing in the present case. Nor, in the opinion of

the court, has a forfeiture of his right been incurred by the complainant through his negligence, as contended under the second head.

A very late case, of *Prendergast v. Tuston*, Michaelmas term, 1841, reported in the Law Journal Rep., vol. 20, part 1, is a strong authority, it is insisted, to sustain the forfeiture. That decision, it seems, was made by Knight Bruce, vice chancellor, in which it was held that a partner in certain mines failing to pay an instalment for some nine or ten years, which the company had no right to demand, forfeited the shares he had paid for. On the supposition that the demand of the instalment was not authorised, which seems to be admitted, the decision of Mr. Knight Bruce was wrong, and, unless sanctioned by higher authority, is entitled to but little consideration. But, if the instalment was properly demanded, the decision was clearly right, as the deed of settlement expressly provided "that, if any instalments on the shares should not be paid within fourteen days after the time fixed for payment, they should be forfeited." There were circumstances, stated in the opinion of the vice chancellor, which authorised the court to refuse to set aside a forfeiture which had been legally incurred.

The sum for which the mortgage was given, it was alleged, had been paid by Oliver to purchasers of lots in Port Lawrence, for moneys paid by them and improvements made on their lots; and, it seems, nearly half the amount was for moneys expended by Oliver himself, as he alleged, in paying for and improving lots 223 and 224, which he and Baum jointly purchased. Now there was no special emergency which required the payment of this mortgage debt, or the small debt on which the attachment issued. The payment was not required for building up the town, but, on the contrary, it was demanded on the hypothesis that the town was to be abandoned. And it may be proper to remark, that although several of the members of

the Port Lawrence Company were dead, and others had become insolvent, the remaining partners were abundantly able to pay any just demand against the company.

But judging of the intention by the action, the defendant Oliver was more solicitous of using the debt, as a means of possessing himself of the property of the company, than to obtain the payment of it; and through the instrumentality of the mortgage and the attachment, and the co-operation of Baum, for about eight hundred dollars, he did acquire the whole property of the company, and the three quarter-sections owned by the Piatt company; and by exchanging a part of this property for lots one and two, he acquired town lots 223 and 224, with their improvements, and all the other lots, and their improvements. It was the reimbursement of the purchasers and improvers of these lots, which constituted the mortgage and attachment debts. Here then, it seems, Oliver had all the lots with their improvements, and other property to an immense amount; and yet he, by the purchases under the attachment and the mortgage, had not exhausted half the sum which he paid, as he alleged, to the purchasers of lots. This is a result so extraordinary as to startle a common observer. It shows the strong inducement he had to go against the property of the Port Lawrence Company, rather than against the company or the individuals who composed it. For the protection of property thus acquired, a court of chancery will not be very astute to seek for technical objections, or rules of forfeiture applied in cases wholly dissimilar. The case cited from the Law Journal, in all its essential parts, is unlike the one under consideration.

As regards the third objection, as to a decree between co-defendants, it is laid down in 1 Story's Eq., 630: "In equity, it is sufficient that all parties in interest are before the court as plaintiffs or as defendants; and they need not, as at law, in such a case be on opposite sides of the record."

2 Story's Eq., 729: "In courts of equity, persons having very different and even opposite interests are often made parties defendant." And the court decreed as between co-defendants, in the case of *Chiles v. Boon*, 10 Peters, 177. It seems, therefore, that it is conformable to the rule of proceeding in chancery to decree, as between defendants, where they set up conflicting rights.

We come now to consider the point reserved, whether the relief shall be extended to lots one and two, or limited to the property given in exchange for those tracts, and which was afterwards purchased by Oliver.

Although the tracts of land conveyed to the Michigan University, in exchange for lots one and two, on which the town of Port Lawrence was laid off, have been purchased by Oliver, yet it appears that he subsequently disposed of a considerable part, if not the whole, of those tracts by valid conveyances, which places such parts, or the whole, beyond the reach of this court. It seems, therefore, that no exercise of the powers of this court can reach this property. The difficulties, great as they may be, in reaching the parts of lots one and two which remain unsold, and the proceeds of those parts which have been sold, are far less than those which attend the other tracts.

Lots one and two were received by Oliver, as before remarked, in exchange for the lands of the Port Lawrence Company, tracts three and four, and the four quarter sections which belonged to the Piatt Company. The Port Lawrence Company and the Piatt Company, therefore, as the *cestui que trusts*, may claim lots one and two. This is resisted, on the ground that Oliver was guilty of no fraud in the transaction, but acted in good faith; and that there is no case where a trust is raised by implication, that a court of chancery has exacted a penalty from the trustee; that the property has been made valuable by the skill, labor, intelligence, and influence of Oliver and his associate Wil-

liams; and that, to require them now to account for the increased value of the property, would be unjust and unprecedented.

The court have taken a very different view of the case, and they suppose that they are sustained by the whole current of authority.

In their former opinion the court have not characterised, in strong terms, the acts of Oliver; they supposed it was unnecessary to do so. But they cannot now refrain from saying, that there is nothing in the whole transaction which, in their judgment, can shield him from liability for lots one and two.

In 2 Story's Eq., 502, it is laid down, that "where a party purchases trust property, knowing it to be such, from the trustee, in violation of the objects of the trust, courts of equity force the trust upon the conscience of the guilty party, and compel him to perform it, and to hold the property subject to it, in the same manner as the trustee held it. It has been truly said by an eminent judge, that the only thing to be enquired of in a court of equity, in cases of this sort, is, whether the property bound by the trust has come into the hands of persons who were either compellable to execute the trust, or to preserve the property for the persons entitled to it." 2 Madd. Ch. Pr., 103, 104; Jeremy on Equity Jurisd., B. 2, ch. 3, p. 281; *Adair v. Shaw*, 1 Sch. & Lefr., 262.

"Where ever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or *cestui que trust*." The rule is, that property covered with a trust, however converted or exchanged for other property, and into whose soever hands it may pass, with notice, is still charged with the trust. The principle is illustrated in 2 Story's Eq., 503, by supposing A receives

money from B to purchase a horse, and he buys a carriage; B. is entitled to the carriage, and may sue for it even at law. And further, "it matters not in the slightest degree into whatever other form, different from the original, the change may have been made, whether it be that of promissory notes, or of goods, or of stock; for the produce of a substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such."

The case of *Docker v. Somes*, 2 Mylne & Keene, 665, goes farther, as to the liability of the trustee, than the case now under consideration. Chancellor Brougham says, "The solicitor general has put a case of a very plausible aspect, with a view of deterring the court from taking the course which all principle points out. He feigned the instance of an apothecary buying drugs with one hundred pounds of trust money, and earning one thousand pounds a year by selling them to his patients; and so he might have taken the case of trust money laid out in purchasing a piece of steel, or a skein of silk, and these being worked up into goods of the finest fabric, where the work exceeds by ten thousand times the material in value. But these instances, in truth, prove nothing, for they are cases not of profit on stock, but of skilful labor very highly paid; and no reasonable person would ever dream of charging a trustee, whose skill thus bestowed had so enormously augmented the value of the capital, as if he had only obtained from it a profit."

And the counsel for the defendants contend, that the case at bar falls within the category of the cases supposed by the chancellor, in reply to the one put by the solicitor general. And they propose to return the piece of steel or the skein of silk, as all that justice can demand.

Had not this argument been made in a printed form, I should not have supposed it to have been made deliberately. I can suppose a case in which it might have

applied. If, of the soil of lots one and two, bricks had been made, potters' ware, or any thing else of great value, and which had been sold for more than ten thousand times the value of the soil, the argument used would be conclusive to show that the *cestui que trusts* could not claim the sum realised. In the language of Chancellor Brougham, that would not have been a case of profit on stock, but of "skilful labor very highly paid."

What is the case under consideration? Only a part of lots one and two, perhaps less than one-half or one-third, has been sold by the defendants. By the general advance of the country in improvements and in population, by the great canals made by the States of Ohio and Indiana, which are united and pass through these lots, by the railroad which extends from Toledo to the interior of Michigan, by the great improvements made of the town by the purchasers of lots, and, above all, by the eligible site afforded by tracts one and two for a great city, they have increased immensely in value. Whatever of labor or skill the defendants, Oliver and Williams, may have performed, which conduced to this great result, is a proper subject of compensation; as, also any expenditures which they have made in laying out the town, or in improving it. Even their general superintendency may be satisfied by a just compensation. This case, in fact, differs not in principle from an ordinary one, where, by a disregard of the trust, the trustee, or his assignee, with full notice, comes into the possession of property, which, under propitious circumstances, is rapidly enhanced in value. And it would be a new head in equity, that this rapid advance should shelter the trustee from liability. In plain language, that if the trustee, by his wrongful acts, had made rather a bad bargain, the property in his hands might be reached by the *cestui que trust*; but if he has shown great sagacity and

tact in selecting property so situated, as to outstrip in value all other property in the neighborhood, he is freed from responsibility. At least, that he shall not be held to account for the property at its increased value.

Upon the whole, we think, upon principle and authority, the defendants, Oliver and Williams, are bound to account to the *cestui que trusts* for tracts one and two. That they must receive a liberal compensation for their general superintendency, the amount of which, to be somewhat influenced by the high qualities requisite for the business, and the success with which it was managed. That they shall also be reimbursed for expenditures by them for the laying off, building up, and advancing the town. Those expenditures having been made by them in promoting, as they supposed, their own interest, must be taken to have been made in good faith.

Where lots have been sold, and the purchase moneys received, the defendants must account. But for sums lost through the unfaithfulness of agents, they are not to be held responsible.

It is objected, that this is a case requiring an election, and that under no circumstances can relief be given to any of the *cestui que trusts*, except to the complainant, he being the only one who has made an election. That infants and femmes covert are concerned, who will not be bound by the decree, and may, when they shall become of age or discovert, elect to take the property originally held by the *cestui que trusts*, or prefer a personal remedy against the defendants, Oliver and Williams.

All the parties in interest are before the court, with very few exceptions, either as complainant or defendants; and, of course, have made their election. And the decree of the court, as above indicated, being manifestly for the advantage of those concerned, would be presumed to have been

made with their consent. As to those, if any, who are not parties to the suit, their interests are in no way affected by this proceeding.

Some of the defendants, whose rights are in conflict with those of Oliver and Williams, have not answered the bill; but, with the assent of the complainant, they have been made defendants, and claim under the facts and circumstances set out in the bill. These persons have made their election as fully as if they had answered the bill at length. Indeed, they assent to its truth. And this is the understanding of all the parties concerned. Their rights may be as fully opposed as those of the complainant. In fact, they all claim under the same right, and the only difference between the rights asserted by them and the complainant is, that some of them claim under assignments. These assignments, from the original *cestui que trusts*, must be proved, and may be controverted by the defendants, Oliver and Williams. In this respect they will have as wide a range, and as ample an opportunity to contest these transfers, as if the claimants were plaintiffs. The court do not perceive much force in the objection, either on the ground of election or inconvenience.

A question is made whether Baum, by his mortgage on the property of the Port Lawrence Company, and afterwards by his assignment to Oliver of the certificates for the same, did not transfer the individual interest he held in that company. Baum undoubtedly had a right to transfer his individual interest in the Port Lawrence Company, at any time, and in any manner, he might choose; and the court think that, although he acted as trustee, and as such transcended his power in attempting to transfer the property to Oliver, yet such transfer must be held good to the extent of his individual interest.

It is contended, that Baum had a right to execute the mortgage as trustee, and that, although the purchase by

Oliver under the attachment and the mortgage may be invalid, yet the warranty in the mortgage deed binds the *cestui que trusts*.

It has already been decided, that the defendants, Oliver and Williams, held the property in trust for the *cestui que trusts*, with the exception of Baum's interest; and that tracts one and two, having been received in exchange for a part of the above property, and the four quarter-sections owned by the Piatt Company, are also held by them in trust. Now, if the purchase by Oliver, and afterwards by Williams, substituted them as trustees in the place of Baum, giving them a lien only for the money paid by Oliver, it is not perceived how the warranty can have any effect. A lien on land is not a property in it. The warranty can have no other effect as to the *cestui que trusts* generally, than if there had been no proceedings on the mortgage. It may, perhaps, estop the heirs of Baum, so far as they may claim his interest by descent.

But it is contended that the warranty estops the right set up by the heirs of Baum, which they purchased long after his decease, with assets of the estate that descended to them; and it is supposed that the rule in Shelley's case applies to the one under consideration. That rule is, "when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either immediately or mediately, to his heirs in fee or in tail, that always in such cases the words heirs, &c., are words of limitation of the estate, and not words of purchase." The court do not perceive the application. No part of the right referred to ever vested in Baum, and, of course, it did not descend to his heirs. The heirs acquired it by purchase, and, as regards the present question, it is immaterial whether the purchase was made with the assets of the estate descended to the heirs, or with other means.

A warranty must be annexed to some estate which is

capable of supporting it; for, if a person covenants to warrant land to another, and makes him no estate, or makes him an estate that is not good, and covenants to warrant the thing, in these cases the warranty is void. 4th Cruise Di., 378. The warranty must take effect in the lifetime of the ancestor, who must be bound by it; for the heir shall never be bound by an express warranty, unless the ancestor was bound by it. And the heir must claim in the same right that the ancestor did. 4 Cruise Di., 379.

Where the right is not in *esse* in the heir, or any of his ancestors, at the time of the fall of the warranty, there it shall not bind. Also, a warranty shall never bar any estate that is in possession, reversion, or remainder, that is not divested, displaced, or turned to a right before or at the time of the fall of the warranty. Rp. Co. Litt., 259.

By the common law, the heir shall never be bound to any express warranty but where the ancestor was bound by the same warranty; for if the ancestor were not bound, it cannot descend upon the heir. If a man make a feoffment in fee, and bind his heirs to warranty, this is void, because the ancestor himself was not bound. Also, if a man bind his heirs to pay a sum of money; this is void. Th. Co. Litt., 262, 263.

From these authorities it is clear that, in all cases of lineal and express warranty, the heir is not bound unless the ancestor was bound; so that, at some time before the death of the ancestor, the right must vest in him and descend to the heir, to bind the heir by the warranty.

Now the right in controversy was not in *esse* at the decease of Baum, but was purchased by his heirs subsequently to his death. The warranty, therefore, was never binding on him, and cannot bind his heirs.

This conclusion is not shaken by the position of the defendants' counsel, that a lineal warranty with assets will bind the heir. That doctrine was laid down by Littleton,

on which Coke says, (Th. Co. Litt., 325,) "here it appeareth by Littleton, that a lineal warranty and assets is a good plea in a *formedon* in the descender, wherein it is to be known that if tenant in tail alieneth with warranty and leave assets to descend, if the issue in tail doth alien the assets and die, the issue of that issue shall recover the land, because the lineal warranty descendeth only on him without assets; for neither the pleading of the warranty without the assets, nor the assets without the warranty, is any bar in the *formedon* in the descender. But if the issue to whom the warranty and assets descended had brought a *formedon*, and by judgment had been barred by reason of the warranty and assets; in that case, albeit he alieneth the assets, yet the estate tail is barred for ever."

The old common law warranties, if not in form, in effect have been superseded by covenants real. 2 Bl. Com., 304. No personal action lay at common law upon the warranty; and when an action was brought, as, for instance, a common recovery against the tenant, he vouched his warrantor who was duly summoned to appear; and judgment was given, that the demandant shall recover seisen of the lands in question, and that the tenant shall recover against the voucher lands of equal value to those warranted by him and now lost by his default.

In the same page Coke says, "if the heir in tail bringeth a writ of *formedon*, and a lineal warranty of his ancestor, inheritable by force of the tail, be pleaded against him, with this, that assets descended to him of fee simple which he hath by the same ancestor that made the warranty; if the heir that is demandant may annul and defeat the warranty, that sufficeth him; for the descent of other tenements of fee simple maketh nothing to bar the heir without the warranty."

Now, under the old forms of proceeding on the warranty, the heirs of Baum would not be bound, for the reason that

he was not at any time during his life, the right or estate not being in *esse*. But, in addition to this consideration, no judgment is now given against the vouchee for other lands of equal value on his warranty, but a personal action is brought on his covenant.

We think that the sale to Rowan of the interest of Steel in the Port Lawrence Company, under the deed of trust to Edwards, was valid; and also the transfer of one and a half shares to Ewing by Rowan. And the transfer of Mack and others to Ewing of their interests, we also think is sufficiently proved.

MASSIE'S HEIRS v. GRAHAM'S ADMINISTRATORS ET AL.

The ordinances of Lord Bacon still govern bills of review.

They may be filed for errors of law, for new matter or proof material in the case, of which the party, at the hearing, had no knowledge.

If the new matter would have changed the decree, though foreign to the issue, it is ground for a review.

The mode of filing a bill of review is, by petition setting forth the grounds, and asking leave to file the bill.

As the practice is new in this court, the bill being filed in the present case, considered as a petition for leave, &c.

In England, before the enrolment of a decree, a bill of review will not lie.

To authorise a review, the evidence must not only be newly discovered, but it must appear that by the use of reasonable diligence it could not have been discovered.

A miscalculation in the amount of the decree, by which the defendant is charged with a larger sum than he should be, may be corrected, and the ground of review obviated by entering a credit for the amount, on the unsatisfied decree.

It is not necessary in all cases to comply with a decree before it can be reviewed.

As for instance the execution of a conveyance.

Application for leave must present a *prima facie* case for a review. On the hearing, the same grounds may be considered.

Lapse of time will bar a review. Especially where the death of persons interested in the transactions, leaves no probability of explanation.

The granting of a bill of review is not a matter of right.

Massie's Heirs v. Graham's Adm'rs and others.

Messrs. *Scott* and *Massie* for the complainants, Messrs. *Leonard* and *Stansbury* for the defendant.

OPINION OF THE COURT.

THIS case was argued at the last term, and continued under advisement. It is a bill of review to set aside a decree entered against the complainants, at September term 1815, on the ground of new matter and proof discovered since the entry of the decree.

The ordinances of Lord Bacon still govern bills of review. They may be filed for error in law appearing in the decree, or for new matter or proof material in the case, of which the party had no knowledge at the hearing. There is some contrariety in the decisions, whether the newly discovered matter must not be such as would have been pertinent to the issue at the hearing. But the better opinion seems to be, that this is not necessary. If the matter be of a nature to have changed the decree, though foreign to the issue, it affords ground for a review. Story on Eq. Pl. sec. 416. *Partridge v. Usborne*, Russ. Rep. 195. 3 Atk. 83. 2 Freeman 31.

There is also some want of concurrence in the authorities whether the new proof must not relate to facts which, at the hearing, were not attempted to be proved. And whether merely cumulative evidence of facts controverted at the hearing is admissible. If the new proof be of such a character as to have caused a different decree, it is not perceived why it should not be ground for a bill of review, whether it relate to new facts, or facts contested at the hearing. But whether the ground be newly discovered matter or proof, it must clearly appear that the party, at the hearing, had no knowledge of it, and could have had none by using reasonable diligence. *Young v. Keighly*, 16 Ves. 318. *Ord v. Noel*, 6 Madd. 127. *Bingham v. Dawson*, 1 Jac. Rep. 243.

A bill of review for newly discovered matter or proof, must be filed by leave of the court; for errors in law, it may be filed without leave. This is the English practice, and we have adopted it.

The mode of application for leave to file such bill, is, by petition setting out substantially the original proceeding, and the new matter or proof on which a reversal of the decree is prayed. No such petition has been filed in the present case. Indeed, from the frame of the bill first filed, it was difficult to say whether it was an original bill for relief, a bill in the nature of a bill of review, or a bill of review. It partook more of the nature of an original bill than of any other. But amendments have been made, so as to give the bill now before us, the form of a bill of review. And the first question is, whether this bill, on a motion for leave to file it, shall be considered as a regular petition for such leave.

Forms may sometimes appear tedious, if not unnecessary; but in judicial proceedings, they should never be lightly regarded. They are the result of experience and practical knowledge; and are often the best evidences of the law. They contain in themselves certainty, and when sustained by proof, lead to certain results.

So far as regards the present proceeding, the formality of a petition is supposed to have been dispensed with. At a previous term, with a view to bring this case to a hearing, and meet the wishes of the counsel, an order was entered that the cause should stand for argument as on an application for leave to file the bill, and also on the merits. This departure from form, induced by the peculiar circumstances of the case, is not to be drawn into precedent.

Before the enrolment of a decree, in England, a bill of review to set it aside does not lie, but a supplemental bill, or a bill in the nature of a bill of review. All decrees in that country, until their enrolment, are considered interlo-

cutory; and this is the reason of the above rule. Cooper's Eq. Pl. 88, 89; Mitford Pl. by Jeremy, 90. But in this country, generally, decrees are matters of record; and in the courts of the United States, they are uniformly so considered. *Dexter v. Arnold*, 5 Mason's Rep. 303, 310, 311. As the decree was entered in 1815, and this bill was not filed until 1835, the statute of limitation is relied on to bar the right of complainants. As a bill of review for errors apparent in the decree, is in the nature of a writ of error, the same limitation applies to it. Story Eq. Pl. sec. 410. *Smith v. Clay*, Ambl. Rep. 645. 3 Bro. Ch. Rep. 639. But it would seem the statute should not operate against a bill of review for newly discovered matter, only from the time of such discovery. Five years, by the statute, bars a writ of error; but five years from the discovery, in this bill, did not elapse before it was filed.

A reversal of this decree is asked, on two grounds. 1. A mistake in the calculation of interest. 2. Payments made by the conveyance of land, and otherwise, and not credited.

From the original bill, it appears that Nathaniel Massie, the ancestor of the complainants, acted, for many years, as the agent of Graham, of Virginia, in the sale of Ohio lands. That on the 7th of August, 1805, a settlement between the parties took place, in which Massie was found indebted to Graham in the sum of \$12,674 96; for the payment of which, the 10th of September following, a bond was executed. Massie continued to act as agent until the 23rd of February, 1807, when his agency was revoked in a power of attorney given by Graham to Robert Means. Another settlement was had between Massie and Graham, by his attorney, Means, the 30th June, 1807, in which the debt of Massie was increased to \$16,512 96. To secure this certain lands were mortgaged. A bond was also executed for \$8,834 67, the 1st of August, 1807, payable 1st July, 1809.

In November, 1813, Massie died, and in 1814 the bill was

filed against his administrators and heirs, to foreclose the above mortgage. The court decreed a payment of the sum of \$16,512 96, with interest on \$12,674 96 from the 10th of September, 1805, the time the first bond became due; on the sum of \$3,834 67, from the 1st July, 1807, the amount of the second bond, and the mortgaged premises were ordered to be sold, &c.

It is insisted, that the bond for the sum of \$3,834 67 included up to its date the interest on the first bond; and that the decree should only have required the payment of interest on the gross sum from the date of the last bond. This would make a difference between the sum decreed and the sum due of \$1,373 12.

That the above mistake occurred, is not seriously controverted by the defendant's counsel. But they contend—

1. That this mistake is no ground for a bill of review;
2. That it was the result of negligence;
3. That there is a larger sum still due and unpaid under the decree, and they are willing to enter a credit for the amount claimed.

It is said, in Seton on Decrees, 399, that in case of mis-casting and miscounting, where the matter appears from the decree itself to be mistaken, it may be corrected by an order. The court will at any time correct a mere clerical error in a judgment, where the error is apparent; and so in a decree where the error appears from the decree itself, it may be corrected in a summary mode by the court. But is such the error complained of?

In the first place, the error does not appear from the decree itself. It can only be made to appear by evidence showing the consideration of the second bond. Had that bond been given, as might well be presumed, for moneys received, or other ground of indebtedment discovered with the first bond, the decree was correct. And its incorrectness

can only be shown by proof that the second bond included the interest up to its date, on the first bond. The error, therefore, cannot be considered as merely formal, nor one which the court, on motion, may order to be corrected.

Are the complainants chargeable with negligence, in not discovering this evidence, and using it at the hearing?

It is not enough that the evidence was not within the knowledge of the party at the hearing, but it must appear that it could not have been known, by using reasonable diligence.

In the cases of *Bingham v. Dawson*, 1 Jacob's Rep. 244, and *Harvey v. Murrell*, Harper's Eq. Rep. 257, it was held that the absence of an inventory which might have been procured at the proper office by a search, could not be a ground for a bill of review. *Young v. Keighly*, 16 Ves. 338. *Dexter v. Arnold*, 5 Mason's Rep. 312. *Livingston v. Hubbs*, 3 John. Ch. Rep. 124. If there be any laches or negligence, the party is not entitled to relief. And the question here arises, whether there was negligence, in this case, chargeable to the complainants.

The present complainants being infants at the hearing in 1815, they were represented by a guardian *ad litem*, appointed by the court. Still, if this guardian were guilty of gross negligence, it might conclude the rights of the complainants. But, in this respect, there is no proof of such negligence.

It is hardly to be expected that the guardian should have searched for the memoranda of the second settlement.— There was nothing on the face of the second bond to show that it included the interest on the first bond; and such a presumption could not arise. It was ascertained from the notes of the settlement; and these, under the circumstances, we do not think the guardian was required to search for. Of this error in the calculation of interest the complainants

may, therefore, take advantage by a bill of review; unless the *remittitur* proposed by the counsel for the defendants shall change their right in this respect.

By the calculation of the complainants' counsel, there remains unpaid on the decree only the sum of \$1,042.73, exclusive of costs, a sum less, by \$333, than the amount erroneously charged for interest. This calculation adds the interest up to the time of the sale of the mortgaged premises. But the defendant's counsel produce a very different result, by adding the interest up to the time the money was paid. And this is in conformity with the decree. It avoids compound interest, by ordering the payment of the two bonds, with interest from their dates until paid. This mode of calculation leaves a balance due on the decree including costs, after deducting the interest erroneously computed. A *remittitur* of this interest will correct the error complained of; and of course, in that particular, remove all ground for a bill of review.

An objection is made to the filing of this bill, on the ground that the decree, sought to be reversed, has not been performed. This is generally a good objection. But there are cases where a review of a decree is allowed, though it has not been performed:

By one of the ordinances of Lord Bacon, the decree must be performed before a bill of review can be brought. If the decree be for land, the possession of it must be surrendered; if it be for money, the money must be paid. But if any act be decreed which extinguishes the party's right at common law, as making of an assurance or release, acknowledging satisfaction, or canceling of bonds, it may be dispensed with, on the special order of the court. So, where the party is unable to pay the money decreed. Story on Eq. Pl. sec. 406. *Partridge v. Usborne*, 5 Russ. Rep. 195, 244, 253. 2 John Chan. Rep. 488. Mit. Pl. by Jeremy, 88: 1 How. Eq. side, 329. The proposed *remittitur* being en-

tered, this objection does not lie to the present bill, for the balance of the decree which remains unsatisfied is very small, and it may be a matter of doubt whether such balance will amount to more than the costs.

Before the other grounds for leave to file this bill are considered, it may be proper to inquire how far, on a petition for leave, matters of explanation or defence may be examined.

In the case of *Hodges v. Mullikin*, Bland's Rep. 506, the chancellor said, "on application for leave to file a bill of review, on the ground of newly-discovered matter, I consider more correct that the propriety of granting the leave should be at once fully investigated; that proofs should be admitted in relation to it; and that the question should be then finally determined."

But this seems not to be the course of the court. If leave be given to file the bill, the defendant in his answer may contest the materiality of the evidence, and the fact of its having been newly discovered. On the petition a strong *prima facie* case should be made out, and, to prevent abuse in such proceeding, counter affidavits may be received, and other evidence against the facts stated in the petition.—*Dexter v. Arnold*, 5 Mason's Rep. 309. But this being only a preliminary proceeding, the defendant ought not to be concluded from contesting the facts on the hearing of the bill of review.

The second ground for leave to file this bill is, a receipt by Robert Means, agent for Graham, dated 31st July, 1807. This paper acknowledges the receipt of two notes; one given by Jozabad Lodge for two hundred and forty-six dollars; the other by John Timberlake, for three hundred and twenty-seven dollars and eighty-nine cents, due the 1st of October ensuing, "which said notes, when collected, to be paid John Graham on account of said Massie;" also, "received said Massie's relinquishment unto his portion of

bonds and debts now due in the hands of Nathaniel Pope, the whole amount thereof being eleven hundred and fifty-two dollars and seventy cents, the one-third thereof being said Massie's proportion; and also bonds and debts not due for land sold by said Pope for five hundred and nine dollars and sixty-five cents; the one-third thereof being said Massie's proportion; that when all or part thereof is received, to be likewise applied to said Massie's credit with said Graham." Pope, in the sale of lands, was the agent of Graham, and also of Massie. No part of these sums were credited in the decree, and it is insisted that all of them should have been so credited.

Nearly thirty-four years have elapsed since this receipt was given. Massie, Graham and Dunn, and perhaps Means, are dead. No explanation can now be given of the transaction, except what appears on the face of the receipt, and some memoranda in regard to subsequent dealings between Massie and Graham. To allow a review of a decree after so great a lapse of time, and under such circumstances, would require strong evidence. Evidence not clear, or which is susceptible of a different application, must be held insufficient.

This receipt, it must be observed, is dated the day before the last mortgage bond bears date. And as this bond was given on a settlement of accounts, subsequently to the other bond in the decree, which had been given on a prior settlement, the inference is at least plausible that the sums named in the receipt were to be credited on the bonds. And this inference, if weakened, is not overthrown by the words in the receipt that, "the notes (or money) when collected were to be paid to Graham on account of said Massie." To be paid, on account, in common parlance, may not always refer to an open account, but may mean to the credit of the party. The language of the receipt, therefore, does not necessarily lead to the conclusion that

these payments were not to be made on the bonds. Other facts in the case, though not connected with this receipt, may shed some light upon it.

Now if it shall appear that the settlement on which the second bond was given was not final, but that open accounts of monied and other transactions remained between the parties, the inference would be that the sums named in the receipt when paid were to be applied on such accounts.

On the 18th December, 1809, Nathaniel Massie, in writing, acknowledged to Walter Dunn, to have received of Joseph West two hundred and twenty-one dollars, the 6th December, 1806, for John Graham, "which he would settle and account for at any time." And again, on the 23d of the same month and year, he acknowledged that he had received one hundred and twenty-six dollars and fifty cents, "on account of Graham, which he promised to pay to Dunn at any time."

And it seems, by a paper signed by Massie, dated 10th May, 1810, that he was authorised to sell the land mortgaged to Graham, at a fixed price. And this paper shows that the bonds were unpaid at its date. It also appears, though not perhaps in an unexceptionable form, that certain sums specified in the receipt of Means, which were paid to Graham, he credited to Massie. The facts in the case fully establish, that, subsequently to the mortgage, Massie received moneys of Graham on land sales; that at the settlement on which the mortgage was given, all the moneys thus received were not embraced, and consequently the settlement was not a final one. This also appears from the correspondence of the parties and certain contracts respecting lands. So that if Massie ceased to be the general agent of Graham after the power was given to Means, he still continued to act as agent to some extent, not only in regard to past, but future transactions.

Taking into view the facts and circumstances which bear

upon the receipt of Means, instead of showing that the sums named in the receipt were intended to be applied, when received, to the payment of the mortgage bonds, they rather lead to a different conclusion. And this, connected with the great lapse of time, must be held conclusive against the sufficiency of this ground for leave to file the bill.

The third ground relied on is, that payments on the mortgage debt were made by the conveyance of certain lands to Graham, and the payment of certain moneys to Dunn as agent for Graham.

On the 22d June, 1810, Walter Dunn writes to Massie from Richmond, Virginia, that he had received one hundred sixteen dollars and sixty-nine cents, which he had entered to his credit with his uncle Graham. And the 8th May, 1811, Dunn received thirty-three dollars and thirty-three cents, being at Richmond, which were placed to Massie's credit with Graham. And also the 15th August, 1811, Dunn received one hundred and twenty-one dollars from Massie. These sums it is insisted should have been credited on the mortgage bonds, and that not having been so credited, nor in the decree, it is ground for a review of the decree.

There is no evidence that these payments were made on the mortgage. And can such payment be inferred, when the evidence shows an open account of money and land transactions, between the parties, at the time of the payments. To authorise the leave prayed, it is not enough that the evidence should bring the mind to balance probabilities. The fact of payment, and of its having been newly discovered, must be clear. Such is not the proof in regard to the above items.

The complainants rely on two deeds for certain tracts of land executed by Massie to Graham, and a deed executed by Abijah Oneal to Graham, for three hundred and forty acres,

for the consideration expressed of two thousand nine hundred and thirty two dollars, as showing a payment of that amount on the mortgage. There is no evidence of the consideration for these conveyances, nor how it was paid, except what the deeds contain. And there is nothing on the face of the deeds which show how the consideration was paid, or was intended to be applied. The facts in the case authorise a presumption that the lands were not conveyed in payment on the mortgage.

It seems that in February, 1810, Massie owed Graham on account of warrants located, five tracts of land, amounting to four thousand five hundred and thirty-five acres. And that by an agreement executed the 19th November, following, Massie binds himself to convey to said Graham nine hundred and fifteen acres in addition. Without adverting to other and similar transactions between these parties, it may be assumed as highly probable, that the three tracts conveyed to Graham, as above, were conveyed to him on other considerations than payment on the mortgage.

The granting of a bill of review is not a matter of right. This is the import of Lord Bacon's ordinance. In the exercise of its sound discretion the court may refuse leave to file a bill for new discovered evidence, although the facts, if admitted, would change the decree. Story Eq. Pl. sec. 417. *Bennet v. Lee*, 2 Atk. 528. *Wilson v. Wall*, 2 Case Rep. 3. *Young v. Keighly*, 16 Ves. Rep. 348. *Partridge v. Usborne*, 5 Russ. Rep. 245. *Dexter v. Arnold*, 5 Mason's Rep. 315. *Thomas v. Harvie's Heirs*, 10 Wheat. Rep. 146.

The grounds on which this application rests have been examined with some minuteness; and with the exception of the first one, which is obviated by a *remittitur*, there is no clear and satisfactory evidence of payment to any amount, having been made on the mortgage. Indeed, in every instance the presumption is rather against such pay-

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ment. If, on such evidence, after the lapse of more than thirty years, the parties all being dead, a decree should be reviewed, great mischief would result. The application for leave to file the bill is overruled.

THE UNITED STATES v. JOHN PATTERSON.

A marshal of the United States is bound to pay over to his deputies and assistants, in taking the census, the same funds, or their equivalent, which he may have received from the government.

And if he pay less, he is liable to the penalty of five hundred dollars, under the act of the 3d of March, 1839.

An informer is a competent witness, although he may receive a part of the penalty. This is not strictly the rule at the common law.

But it is founded on necessity and policy, and is now fully established.

A sale of treasury notes by the marshal for currency, at eight per cent. premium, and a payment of his deputy in such currency, is a violation of the law.

OPINION OF THE COURT.

This is an indictment against the defendant for having, as marshal of the United States for the district of Ohio, paid his deputies for taking the sixth census, less than he received from the government, for the same service. The 11th section of the act of the 3d of March, 1839, in relation to the taking of said census, provides, "that if any marshal, in any district within the United States or territories, shall, directly or indirectly, ask, demand or receive, of any assistant to be appointed by him under this act, any fee, reward or compensation, for the appointment of such assistant to discharge the duties required of such assistant, any portion of the compensation allowed to the assistant by this act, the said marshal shall be deemed guilty of a misdemeanor in office, and shall forfeit and pay the amount

of five hundred dollars for each offence, to be recovered by suit or indictment," &c.

As the informer, under this statute, receives one half the penalty, on conviction, being called as a witness, he was objected to, as incompetent. "An informer, who is entitled to any part of the penalty, is, in general, incompetent to give evidence; but in some instances the testimony of informers has been received, where a statute could receive no execution unless the party seeking to recover the penalty were admitted as a witness." 4 Phil. on Ev. 166. *Howard v. Shipley*, 4 East, 180. *Mead v. Robinson*, Willes, 425. Although by the common law informers entitled to a part of the penalty are incompetent, yet by the particular provisions or policy of several acts of parliament, they may be admitted. "In a prosecution on Stat. 21 Geo. III. chap. 37, against exporting machinery, the informer is competent. So on a prosecution for penalties under Stat. 9 Ann, chap. 14, sec. 5, the loser of money at cards may prove his loss. And on a prosecution under Statute 23 Geo. II. chap. 13, sec. 1, for seducing artificers to go out of the kingdom, the prosecutor is a competent witness, although entitled to a moiety of the penalty." In neither of the above acts is it provided that the informer may be a witness.

In the *United States v. Murphy et al*, 16 Peters, 213, it was held that an informer was a competent witness, although he received a part of the penalty, "upon the ground of necessity and of public policy, and of attaining the manifest objects of the statute, and the ends of justice."

The informer, being sworn as a witness, stated, that being appointed by the marshal to take the census in the county in which he lived, was sworn as such; that he performed the work, and was entitled to receive as his compensation five hundred thirty-eight dollars and twenty-six cents; that he received from the defendant a letter

enclosing a check for five hundred and twenty dollars and twenty-six cents, on the Columbus Bank; that eighteen dollars were retained under the pretence that the return was imperfect, and had to be corrected. The witness returned the check, and requested that he might receive his pay in treasury notes. Afterwards, when witness saw defendant at Columbus, he proposed to receive from him a thousand dollar draft, but the defendant refused to pay it, saying that he had no funds, but those in the Franklin Bank. This was about the 9th of July, 1841. Subsequently, defendant offered the witness a check on the receiver at Jeffersonville, to pay other claims which the witness might have, if he would pay specie in change, the check being large. This the witness could not do. The witness then received the check first transmitted to him, demanded specie of the bank, but was refused, and he was obliged to receive currency, which was at a discount of some six or ten per cent. He used the paper at a loss of ten per cent. Defendant refused to pay the witness the premium for which he sold the treasury notes. Witness offered to take less; but this also was refused.

It was proved that treasury notes were worth nine or ten per cent. in currency. The treasury notes remitted to the defendant were sold by him for eight per cent.

The cause was argued before the jury, by the counsel on both sides.

The court instructed the jury, that a payment in currency of less value than the treasury notes received by the government, was a violation of the act above cited, and subjected the defendant to the penalty prescribed by it; that no public officer can speculate upon the funds of the public placed in his hands for disbursement; that the act was designed to prevent such an use of the public money. But if a deputy, knowing his rights, should voluntarily receive in payment that which was of less value than

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specie, he would have a right to waive his claim in this respect. But, if he was ignorant of his rights, or if knowing them, was compelled by circumstances to receive less than the entire sum in specie, or its equivalent, the defendant must be found guilty. If the assistant, in this case, was paid in a currency of less value than treasury notes, by eight per cent., the defendant as much violated the law as if he had retained the same per cent., paying the balance in specie.

The jury found the defendant guilty, &c.

LEWIS ET AL v. BAIRD ET AL.

There must be an answer denying the fraud charged in the bill, in support of the plea.

The answer being broader than the plea, overrules it.

Fraud must be denied in the plea as well as in the answer.

Where one defence is made by the plea, and another by the answer, the plea will be ordered to stand for an answer.

The ordinance of 1787 regulates the form of conveyance of real estate.

An equity may be assigned or transferred in any form not prohibited by law.

Though an equity be conveyed, under the forms of a legal right, it does not change the title.

The recordation of a deed, conveying an equity only, would not be notice under the law.

A record of a deed in Kentucky, for lands in Ohio, is no notice to a subsequent purchaser.

A copy of such record is not evidence.

The contents of a deed, destroyed by accident, may be proved by parol.

Where there has been a great lapse of time, strict proof of a destroyed deed, under which parties have claimed, may be dispensed with.

The recording of a copy of a deed in this State, can have no effect.

Where any act has been done by the trustees, under a trust deed, it is evidence of an acceptance of the trust.

An agency must be proved to bind the parties interested.

A trustee is presumed to act for the benefit of his *cestui que trust*.

Under certain circumstances he may convey to an innocent purchaser for a valuable consideration.

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No greater interest can be conveyed by the grantor than is vested in him.

It is said that a deed is to be construed most strongly against the grantor.

The reason for this rule is not perfectly satisfactory.

In explaining an instrument all the parts of it must be taken together.

Less strictness in the description of the property is required in a contract to convey, than in a deed of conveyance.

There being no proof of indebtedness by the grantor, the trust deed cannot be held fraudulent.

Occasional insanity arising from intemperance, not sufficient to set aside a contract.

An assignment of a military warrant, under which a claim has been asserted for many years; may be presumed to be genuine, and to have been made for a valuable consideration.

After the lapse of nearly half a century, the consideration for such a contract cannot be expected to be clearly established.

A deed executed by an executor under a will before the emanation of the patent, can convey no legal title.

But if the patent issue in the name of the executor, it operates in favor of the prior conveyance by way of estoppel.

And this effect follows, whether the will authorizes the executor to convey or not.

A warranty is limited by the nature of the estate conveyed.

It must have an estate upon which to operate.

A deed must have upon its face all the requisites of a valid instrument.

Where a deed conveys title, a warranty can never operate by way of estoppel.

Where an interest passes under the deed there can be no estoppel.

The statute of limitations, under the decision of the Supreme Court of Ohio, bars the heirs of a non-resident, by an adverse possession of twenty years, during the life of the ancestor.

But lapse of time will operate as a bar, against a non-resident, under certain circumstances, although the statute does not run against him.

Chancery will always refuse its aid against conscience where the demand is stale and there has been great negligence.

In their bill the complainants set up a claim to a certain tract of land, in possession of the defendants, and to which they claim title; and a decree for the title and possession is prayed.

It seems that General Robert Lawson, the ancestor of the complainants, having served in the Virginia continental line in the revolutionary war, received for his services a military warrant No. 1721, for ten thousand acres of land; which, before the 4th June, 1794, was located in the Vir-

ginia military district, in this state, in tracts of one thousand acres each; under the following numbers of entries. 1704, 1705, 1706, 1707, 1714, 1715, 1716, 1717, 1718, 1719.

On the 4th June, 1794, as the bill states, an Indenture of three parts was entered into between Robert Lawson of Fayette county, Kentucky, of the first part, Sarah his wife of the second part, and James Speed, George Thompson, Joseph Crockett, and George Nicholas of the third part, which was duly signed and delivered; and which for the considerations therein expressed, conveyed to the said parties of the third part, and to their heirs, executors, administrators and assigns of them, their survivors and survivor, one hundred and fifty acres of land on which Lawson then lived; "also two thousand acres of military land situated on White Oak Creek, on the north west side of the Ohio, being the land mentioned in the first entry made for the said Lawson on the surveyor's books;" and also among other real and personal estate, "five thousand acres of land on the north west side of the Ohio, being part of the land obtained by the said Lawson for his military services, and part of ten thousand acres which have been laid off in lots of one thousand acres each, and being the last entries made in the name of said Lawson." To have and to hold the lands, &c. to them the said James Speed, George Thompson, Joseph Crockett and George Nicholas, their heirs and assigns forever; and to the survivors and survivor of them, their heirs and assigns forever; upon the special trust that they will permit the said Lawson and his wife, and the survivor; and the said Sarah, if she should again separate from her husband, to use, occupy, possess and enjoy during their natural lives, and the life of the survivor, under the exceptions above stated, the one hundred and fifty acres of land in Fayette county, &c.; and that they will convey the same to whom she may appoint, by any instrument of writing under her hand, and attested by one witness, sub-

ject," &c., and also that they will "convey the two thousand acres of land on White Oak Creek, to either of the sons of the marriage to whom the said Sarah shall direct; unless the trustees shall judge it proper to dispose of any part or parts of the said tract for the use of the family," &c., and the trustees were authorised to convey, as specified, to the children of the said Lawson, in different parcels, the five thousand acres. And the said Lawson covenanted with the trustees that he would at no future time, "offer any personal violence or injury to his wife, and that he would abstain from the intemperate use of every kind of spirituous liquors, and that if he should any time thereafter again offer any personal violence or injury to his wife, the trustees were authorised to dispossess him of the hundred and fifty acres of land," &c. Entries 1707 and 1714, the complainants aver, covered the two thousand acres conveyed by the above deed; and that the five thousand acres conveyed were covered by entries 1718, 1719, 1704, 1705 and 1706.

On the 16th August, 1796, Lawson made an assignment to one John O'Bannon, of three thousand three hundred and thirty-three and one-third acres, of the part of his warrant which had not been surveyed, for value received. This assignment is charged to have been without consideration, and when the mind of Lawson, by intemperance, was rendered unfit to make a contract, and notice of the trust deed by O'Bannon is averred.

That on the 25th August, 1796, O'Bannon, well knowing that the aforesaid entry of 1707, had been conveyed by the trust deed, fraudulently withdrew it, and re-entered, in his own name, 965 acres, under the same number, on the waters of Straight creek. This is the tract in controversy in this suit.

O'Bannon having obtained the plat and certificate, deposited them, before the 12th February, 1799, in the De-

partment of State, and applied for a patent. That the trustees, by their agent, Joshua Lewis, entered, on the above day, a caveat against the issuing of a patent on this fraudulent proceeding. And afterwards, on the 9th May, 1811, the Department of State suspended the further issuing of patents on the warrant of Lawson.

Lawson and wife remained together but a short time after the execution of the trust deed. Mrs. Lawson went to Virginia, where she died, in 1809, never having appointed, as provided by the trust deed, to whom conveyances should be made. Lawson, in 1800, was taken to Virginia, and remained in Richmond, supported by charity; his mind and body being in a most deplorable condition, until his death, which took place four years before the death of his wife. In 1800, George Nicholas, one of the trustees, died; and some time afterwards James Speed and Joseph Crockett, also, died; by which the trust estate vested in George Thompson, the survivor, and his heirs. On the 22d March, 1834, George Thompson died, and left George C. Thompson, one of the complainants, his son and only heir at law, in whom the trust estate became vested.

Various disabilities, and non-residence, are alleged in the bill, as an excuse under the statute of limitations and the lapse of time.

John O'Bannon died in January, 1812, having made a will, and appointed Robert Alexander, Esquire, and George T. Cotten, his son-in-law, executors. And on the 21st of December, 1816, Cotten fraudulently and with full notice of the trust deed, the bill alleges, obtained a patent, from the General Land Office, in his own name, "as executor of the last will and testament of the said John O'Bannon, in trust, for the uses and purposes mentioned in his will, for the tract of 965 acres." O'Bannon left several devisees, who are not within the jurisdiction of this court.

Some years before the emanation of the patent, Cotten,

as executor, conveyed the land to William Lytle, who had purchased it from O'Bannon, in his life time. Cotten died, testate, some time after he obtained the patent.

The defendants plead in bar, that they are purchasers from Lytle, and those claiming under him, for a valuable consideration, without notice, and they exhibit their deeds, &c. They also file an answer in support of their plea, in which the fraud alleged in the bill, and all facts going to show equity in the claim of the complainants, are denied. And in an amended answer they set up in bar the statute of limitations and lapse of time.

The complainants took issue on the plea, and filed a general replication.

The first question arises on the state of the pleadings.

The answer is not only full to the whole merits of the bill, but it sets up new and substantive defences: the statute of limitations and lapse of time. The bar alleged in the plea is a *bona fide* purchase for a valuable consideration without notice.

There is some confusion in the authorities and in the elementary treatises, as to the extent and effect of an answer in support of a plea. In a note in Mit. 240, it is said, "that in the cases in the court of Exchequer, it seems to have been supposed that the answer in support of the plea overruled the plea. But an answer can only overrule a plea, where it applies to matter, which the defendant, by his plea, declines to answer, demanding the judgment of the court, whether by reason of the matter stated in the plea, he ought to be compelled to answer so much of the bill." In such a case, the answer being broader than the plea, overrules it. Story's Eq. Pl. 532.

Where fraud is alleged in the bill, it should be denied in the plea, and also in an answer in support of the plea. The complainant is entitled to the oath of the defendant, and if the answer do not deny the fraud, the

plea may be overruled absolutely, or only as an immediate bar, saving the benefit of it to the hearing of the cause. Story's Eq. Pl. 536-7. But the objection here is, that the answer sets up a different defence from that made in the plea. In Story's Eq. Pl. 537-8, it is said, "if one defence is made by the answer, and another by the plea, the plea will be ordered to stand for an answer." In such case, the plea is considered as a part of the answer, and, with leave of the court, may be excepted to. Story's Eq. Pl. 543. As the answer in this case brings the plea clearly within the rule stated, it must be considered merely as a part of the answer.

The complainants rest their right mainly on the trust deed; and it is necessary to inquire into the execution and effect of that deed.

The Ordinance of 1787 for the government of the Northwestern Territory, provides, that "real estate may be conveyed by lease and release, or bargain and sale, signed, sealed and delivered by the person being of full age in whom the estate may be, and attested by two witnesses, provided such conveyance be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts and registers shall be appointed for that purpose." Under this law, the deed of trust is alleged to have been executed.

The provision in the Ordinance refers to the legal and not the equitable conveyance of real estate. An equity like the one in question could be conveyed by an assignment on the warrant, or on a separate paper, as well as by a deed containing all the solemnities required by the Ordinance. Lawson had only an equitable title arising from entry, to the Ohio lands named in the trust deed. That deed, if duly executed, conveyed to the trustees the title which Lawson had in these lands; but the character of the instrument could convey no higher or better title than he

possessed. The lands in Kentucky and in Virginia, which the deed purported to convey, may have been conveyed in fee; the fee at the time being vested in the grantor. But this can have no effect, either as regards the proof of the instrument in this case, or the interest assigned to the Ohio lands.

An individual having merely an equitable interest in land, may convey that interest by a deed duly acknowledged; but such an instrument, not purporting to convey the land in fee, but an equity, is not within the statute or Ordinance, and consequently is not proved by an acknowledgment, as a conveyance in fee. Such a deed, if duly recorded, would not be constructive notice under the statute. If a deed on its face purport to convey land in fee, or for a term of years, perhaps, though the grantor has no interest in the land, yet the execution of the instrument may be proved by its acknowledgment. It is within the law, and its signing and delivery are proved in the same mode as an operative instrument.

The land in controversy, it is alleged, is covered by the description in the trust deed of "two thousand acres of military land situate on White Oak creek, on the northwest side of the Ohio, being the land mentioned in the first entry made for the said Lawson, on the surveyor's books." This land the trust deed purports to convey. But how is it conveyed. In fact and in form the equity only is conveyed. It was "all the interest the grantor possessed," and he describes it by a reference to the "entry on the surveyor's books." There is no covenant of *seisen*, nor any expression in the deed which shows an intention to convey any other interest in the land, except that which resulted from an entry.

But if the deed were a conveyance in fee of these military lands, a record of it in Kentucky, though duly certified, would not make the copy evidence in this state. The deed is required to be recorded in this state, after it has

been duly acknowledged, and a certified copy of the record thus made is evidence under the statute. The recording of the deed, therefore, in Kentucky, if clearly shown, would not make either a certified or sworn copy from the record evidence. The original being lost, a sworn copy of it is the next best proof.

From the depositions of Fielding L. Turner, and others, there is reasonable proof of the loss of the original trust deed. The recorder's office where it was deposited for record was burnt before 1806, and it is highly probable that that deed, with many others, was destroyed. The above witness was deputy clerk in the office where the deed was deposited, and he states that he saw the original deed, which was in the hand writing of George Nicholas. He says the parties to that deed, and the witnesses, are now dead. A copy of the deed in the hand writing of Colonel Nicholas is in evidence, and it agrees substantially with the deed which has been copied from the Fayette records. That deed, from the records of the Fayette county court, appears to have been acknowledged and proved by the subscribing witnesses, before it was recorded. Lawson's letters refer to the deed, and also the letters of George Nicholas, one of the trustees. These and other references are not only to the existence of the deed, but to an important part of its contents. A copy of the deed was filed in the department of state, at the time the *caveat* was entered.

It has now been nearly half a century since the deed purports to have been executed. The evidence does not come strictly within any of the defined rules, as to the proof of lost instruments; but we think the facts and circumstances adduced create a strong probability that the deed was executed; and that its contents are truly stated in the copies certified.

No effect can be given to the record of the deed in Hamilton county, of this state. That record was made, not from

the original deed but a copy, and consequently the record is invalid for any purpose. It does not appear at whose instance this copy was recorded. Did the trustees accept the trust. As their signatures were affixed to the trust deed, the presumption is that they did. At least they co-operated in the execution of the deed from which their powers were derived. And in a letter to Gen. Lawson, dated nearly two months after the trust deed was executed, George Nicholas, one of the trustees says, in reference to a proposition to sell two thousand acres of the Ohio lands, in the trust deed, "if I had it in my power and was ever so well disposed to do it, I should only have one voice in four as to the disposal of the 2000 acres of land, which is all that the trustees have any power over." "It is my opinion that it ought by no means to be applied to answer current expenses, because if it is, it must necessarily soon be exhausted; but that when the title is completed, and the value of the land increased, that it may be sold," &c. And he says "I will show your letter to the other gentlemen." From this it would seem that the writer not only recognised the trust, but so far as his advice would go, acted under it. And he promises to show the letter to the other trustees. But beyond this, there is believed to be no evidence that the trustees acted under the deed.

Lewis represented himself as the agent of the trustees, in entering the caveat in the Department of State. But there is no evidence of this agency. James Speed, one of the trustees, states that "the caveat entered in his name and others, as trustees of Gen. Lawson, against issuing of grants &c., had been entered without his knowledge or consent. That he never did act or intended to act as trustee."

The consideration named in the trust deed was, that the wife of Lawson consented again to live with him, and also that she and George Nicholas consented to release him from

his covenants in a certain deed previously executed, and in consideration of five shillings," &c.

The principal object of the trust deed was, to procure a reconciliation between Lawson and his wife, and preserve harmony in the family. But it seems that this effort, like the previous ones, proved abortive. In a short time the parties again separated, and Mrs. Lawson went to Virginia. From the time of this separation it does not appear that either the trustees, General or Mrs. Lawson, took any action under the trust deed. The great object of the deed having failed, it seems to have been lost sight of by all the parties to it. As the act of Lewis, in entering the caveat, has been disavowed by one of the trustees, their authority to do the act cannot be presumed.

But it is insisted that the trust having vested, the neglect or unfaithfulness of the trustees shall not prejudice the *cestui que trusts*. The estate having passed by the trust deed, cannot be divested, except by an instrument of equal solemnity.

Except where the trustee conveys the estate to an innocent purchaser for a valuable consideration, without notice of the trust, it is a well settled principle, that he can do no act to the injury of his *cestui que trust*. If he sell the estate the *cestui que trust* may set aside the sale, demand the purchase money or claim the property, to the purchase of which, the money may have been applied. And the principle is also clear, that where an estate is conveyed in fee, the destruction of the deed or any other act, short of a reconveyance, cannot revest the title in the grantor. But how does this doctrine apply to the case under consideration. No fee was conveyed by the deed of trust, as regards the Ohio lands. A mere equity was all that Lawson possessed, and, consequently, all that the deed could pass. Its mode of transfer was not regulated by statute. It could be assigned by the trustees, or reassigned by them to Lawson, by

writing, in any form which the parties might choose; or, there being no statute of frauds, by a parol contract. This equitable title, then, which vested in the trustees, under the deed, is not governed by the principle of law adverted to. That principle applies exclusively to a conveyance of the legal title.

The deed of trust describes the land as "two thousand acres of Military land, situate on White Oak creek, on the north-west side of the Ohio, being the land covered by the first entry on the surveyor's books," &c. Now, it does not appear that Lawson had any lands situated on "White Oak creek," as here described. At least, it very clearly appears, that the land claimed by the defendants, is not on or near "White Oak creek;" nor is there an entry of Lawson for two thousand acres. And on this ground, the defendants contend, that the land described in the deed, is not the land claimed by them.

There is no rule, in favor of which a greater number of authorities may be cited, than that a deed is to be construed most strongly against the grantor. The reason is, that the person who makes the conveyance, is presumed to weigh and fully comprehend the words used in it. This rule has always appeared to me, to be better sustained by authority, than by sound reason. I cannot see why a deed of conveyance should receive a different construction, from any other instrument under seal. In England, the deed is prepared by the grantee. In this country, the practice is, generally, different.

The intention of the parties, both as to the interest conveyed, and the property, is to be ascertained by the language of the instrument. It must be looked at in all its parts, as one part may explain another. If there be a latent ambiguity, it may, in most cases, be explained by parol; but if the uncertainty arise upon the face of the deed, it cannot be explained.

It would be difficult to sustain the trust deed, as a conveyance of the Ohio lands, in fee simple. To do this, proof must be made that Lawson had no other Military lands north-west of the Ohio, except those located under his warrant for ten thousand acres. And as the entries under that warrant were made for separate tracts, of a thousand acres each, and the deed is for two thousand acres, "being the land mentioned in the first entry made for the said Lawson, on the surveyor's books," it must be proved that by the word, entry, entries were meant. This would be to introduce parol proof, as regards the situation of the land and the description of the title, in contradiction of the deed. It is believed that no case can be found to sustain this proof. But, it is unnecessary to decide this particular question. As regards the land in controversy, the trust deed cannot be considered as conveying any thing more than a simple equity. And in the relation it bears to the present suit, it may be regarded as a contract to convey, rather than a conveyance in fact.

In the bill the complainants set out the description of the title, and the situation of the two thousand acres of land, as given in the deed, and aver that it is the same land as covered by entries, Nos. 1707 and 1714. And other circumstances are referred to in the bill, which conduce to sustain this averment. At the time this equity was assigned to the trustees, the situation of the land must have been imperfectly known by Lawson. The country where it was located, was new, and but little explored except by surveyors; and it is not probable that Lawson had been on the ground.

The books of the principal surveyor afford evidence of no entries made in the name of Lawson, except by virtue of the warrant for ten thousand acres. And the same instrument conveys to the trustees "five thousand acres of land on the north-west side of the Ohio," "being part of the

land obtained by the said Lawson for his military services, being part of ten thousand acres, which have been laid off in lots of one thousand acres each," &c.; from which there would seem to be little doubt, that the tract of two thousand acres intended to be assigned, was located under the above warrant. Indeed, it is probable that the word entry, instead of entries, was an error of the draftsman of the deed. It is the province of a court of equity to relieve from accident or mistake, and give effect to the intention of the parties. Upon the whole, without going into a detailed consideration of the facts and circumstances relied on by the complainants, we are brought to the conclusion, that the averments in the bill, as to the location of the two thousand acres, are sustained; and that on principle, viewing the bill as setting up an equity against the defendants, the evidence is admissible.

From the foregoing considerations, the trustees must be held as vested with the equitable title to the land in controversy, for the purposes specified, the 4th June, 1794, when the trust deed was executed. There is no proof of indebtedment by Lawson, which can make the trust deed void, as against creditors.

The title set up by the defendants, will be now examined.

The defendants' title originated by an assignment of 3,333 $\frac{1}{2}$ acres of his warrant, the 16th August, 1796, from Lawson to O'Bannon. This assignment is charged to have been made fraudulently, and without consideration.

A great number of witnesses have testified as to the habits of Gen. Lawson. It seems he was intemperate before he left Virginia, and that this habit became much worse in Kentucky. Indeed some of the witnesses say that his indulgences in this way were so excessive, as to render him unfit to transact any kind of business. That after the last separation from his wife, he seemed to lose all respect for

himself, his family and society. That he became utterly degraded, the associate of slaves; and was seen in the streets of Lexington imploring money from every person he met with to purchase spirits. Other witnesses speak of him as always intoxicated when he had the means of becoming so, but that when sober, which was sometimes the case, he was capable of transacting business. He was a lawyer by profession, and occasionally, as well after his removal to Kentucky as before it, was engaged in the practice of law.

Daniel Feagins was an attesting witness to the assignment to O'Bannon. He has since died, but his hand writing is proved by his sons, Fielding Feagins and Edward. They both state that General Lawson was at their father's near Germantown, Mason county, Kentucky, a part of the summer of 1796. And the former, who is the elder, says that General Lawson, at that time, when sober, was of a sound mind and capable of doing business of any kind. James McKinney, a witness, who in 1796 lived on the farm of Daniel Feagins, and in the summer of that year saw General Lawson at his house, says that when Lawson was sober he appeared to be a sensible, intelligent man, of good education. That he never saw or heard of any thing to induce him to believe that Lawson was not as capable of transacting business, as any other man. The attempt to prove his insanity, about the time of taking the deposition of the witness, was the first intimation he ever had on the subject.

Fielding Feagins also states that about forty years ago or upwards, he made a trip with General Lawson and his father to Louisville. They embarked in a small family boat at the place now called Maysville, putting their horses on board, and landed at the falls on the fourth morning after their departure. Their business, he says, to Louisville, was, to get a title to a piece of land purchased of Lawson, situ-

ated, now, in Brown county, Ohio. During their trip they had no spirits on board—General Lawson was perfectly sober; in good health and capable of doing any business.

It is probable the assignment to O'Bannon was made at Louisville, as an assignment was made on the same day by Lawson to Daniel Feagins, of two thousand acres of the same warrant, to which Richard C. Anderson, the surveyor, who resided near Louisville, was an attesting witness. This fact is presumptive evidence that on the 16th August, 1796, Lawson was not deemed, by the surveyor, unfit to do business.

Philemon Thomas, a witness, states, that Lawson came to his house in 1795, 1796 or 1797, and offered to sell his military lands in Ohio; but the witness "refused to buy them, or to make any bargain with him, as he appeared to be insane." A short time afterwards the witness states there was a report in the neighborhood, that Daniel Feagins had purchased the lands.

On looking into the whole evidence, and weighing it maturely, the fact of Lawson's insanity, at the time of the assignment, seems not to be established. When intoxicated he was undoubtedly incapable of transacting any business; and it is probable that he was intoxicated the greater part of the time in the summer of 1796. But when sober he was capable of business, and it appears from the statement of Fielding Feagins, that he was not intoxicated, and had not been for several days preceding the assignment of the two thousand acres to his father, which was witnessed by Anderson. As before remarked, the assignment to O'Bannon was made on the same day. Fraud will not be presumed, though it may be proved by circumstances. But the circumstances in this case do not authorise an inference of incompetency on the part of Lawson to make the contract of assignment. Indeed the weight of evidence, as also the presumption of law, is against the position of the complain-

ants. The attempt to discredit the Feagins's by proving their conversations about the time their depositions were taken, and to show that Lawson was not at the house of Daniel Feagins, in the summer of 1796, as sworn by them, cannot, materially, affect their credibility.

Was the assignment to O'Bannon made without consideration.

In his letter to the honorable Thomas Todd, filed in the General Land Office, O'Bannon alleged that he made the original entries under Lawson's warrant, and that that was the consideration on which he obtained the assignment for 3,333 $\frac{1}{3}$ acres. The books of the principal surveyor do not show by whom these entries were made. But from an old file of orders for locations found in the surveyor's office, it appears that O'Bannon gave orders for the entry of numbers 1704, 1706, and 1707, as originally made. On the books, however, his name was not entered as the locator. It seems not to have been the practice at that time to state by whom the entry was, in fact made. In a letter from General Lawson, dated Richmond, 27th June, 1788, to the principal surveyor, he says, "I have waited with anxious expectation to hear from you on the subject of my land warrant put into your hands by Col. Ed. Corrington." "Gen. Stevens tells me he has lately received a letter from you, whereby you inform him, that you must receive either so much cash, or a third of the land for surveying," &c. "I think a third very high, but under the scarcity of money at this day, I must prefer it to the demand in cash."

A certificate is offered in evidence which purports to have been signed by Lawson, and dated at Richmond, 27th November, 1802, which states that Major John O'Bannon was the locator of his military land, and that, "by prior contract he was to have one third of ten thousand acres for his services," &c. To this certificate the names of two witnesses were signed. Bootwright, one of the witnesses, swears that

he never subscribed the paper as a witness, and the other witness is dead, but there is no attempt to prove his hand writing. This certificate is not proved to be genuine, and, consequently, it cannot be considered as in evidence.

On the 30th of July, 1794, in a letter to Colonel Nicholas, General Lawson says, "by the enclosed letter from Colonel Anderson, I am informed that the expenses attendant on the two surveys of one thousand acres each, amount to eight pounds fourteen shillings and sixpence, which he also informs me it is necessary should be paid previous to the delivery of the plats." And he further remarks, "as I have it not at present in my power to advance that sum in money; I should esteem it as a singular favor if you could accommodate the matter with him, and take out the plats," &c. "From what Mr. Massie informed me, I have much reason to believe that more land of my ten thousand acres north-west of the Ohio, hath been surveyed than has been returned and recorded in the surveyor's office, owing to Mr. Fox's death shortly after his return from his last surveys in that quarter. But of this I expect to receive particular information shortly," &c. He proposed to authorise Col. Nicholas to sell some of his lands to indemnify himself, should he advance the money. In his answer, Col. Nicholas declines making an advance, but promises to write to Col. Anderson, the surveyor, that if he will forward the plats, he would become ultimately responsible for the money.

There is no evidence of the payment of the above sum to the principal surveyor. The letter of Lawson has undoubtedly a strong bearing against the truth of the certificate overruled, and also against the assertion of O'Bannon to the general land office, that he was the original locator of the warrant. But the letter states no fact incompatible with the assertion of O'Bannon. It refutes by inference the allegation that the entries and surveys were made by him under a prior contract, for one-third of the land. For

if such a contract had been made, Lawson would have referred to it; as it can scarcely be supposed that he would have forgotten it. The reference to the return of Fox, and his decease, would seem to create some doubt whether he might not have made some of the surveys. There is nothing, however, specifically stated on the subject. In the absence of positive proof, our conclusion on this point must rest on circumstances.

Lawson, in his letter to Col. Anderson, proposed to give one-third of the land called for by his warrant, for locating and surveying it, rather than a money compensation. It is proved, positively, that O'Bannon made three of the original entries in 1788. And it is a strong fact that one-third of the warrant was assigned by Lawson to O'Bannon. In all probability, this assignment was made at the land office, in the presence of the principal surveyor. The assignment made to Feagins on the same day, as before remarked, was witnessed by Col. Anderson. In his official capacity he recognized the right of O'Bannon, under the assignment, a few days after it was made. That Lawson was competent to make the assignment, we have already decided.

Now, in view of these facts, where does the probability lie? From the circumstances of Lawson, it is not probable that he advanced the money. There is no evidence that any one else advanced it for him. He preferred giving one-third of the land to a payment in money; and so stated in his letter to the principal surveyor. And he did transfer to O'Bannon one-third of his warrant. On the same day, Lawson receipted to Col. Anderson for a plat and certificate of two thousand acres of his Ohio military land. Since the assignment, nearly half a century has elapsed. The actors are all dead. Under such circumstances, can positive evidence of the payment of a consideration be reasonably expected. The assignment upon its face is fair, and it purports to have been made for value re-

ceived. Since it was made, O'Bannon, and those who claim under him, have continually asserted their claim. In an ordinary case, the assignment alone would be satisfactory. But in this case there is more than a presumption resting on the assignment itself. Its validity is sustained by several leading circumstances. The answer which, in this respect, is responsive to the bill, declares that the assignment was made on a good and valuable consideration. The complainants impeach it on this ground, and to set it aside they must impeach it by evidence. That this point is not clear of doubt is readily admitted; but looking at the case as shown by the evidence, connected with the lapse of time, we are brought to the conclusion that this assignment is not void for want of a consideration. That a consideration was paid is shown in a clearer point of view than could ordinarily be expected, in so remote a transaction.

But it is contended that if the assignment were *bona fide* and for a valuable consideration, that it did not cover the land in controversy. And that it was a fraud in O'Bannon to withdraw the entry 1707, made in the name of Lawson, and re-enter it in his own name.

The assignment to O'Bannon purports to be of that part of the warrant to be surveyed. All the entries had been made long before the assignment, but what part of them had been surveyed is not shown. By the assignment, O'Bannon had a right to one-third of the entries made, and might, in the exercise of his discretion, withdraw any of them, not exceeding his claim, and re-enter them in his own name. He was limited to the entries not surveyed; but it does not appear that entry 1707 had been surveyed. It appears that on the 25th August, 1796, nine days after the assignment, O'Bannon having withdrawn that entry, he re-entered nine hundred and sixty-five acres under the same number in his own name, on the waters of Straight

creek. If entry 1707 had been surveyed, it is not perceived, from the evidence in the case, how that fact could affect the defendants.

On the 4th January, 1812, O'Bannon sold the entry 1707 and survey of nine hundred and sixty-five acres, as the answer alleges, for a valuable consideration, to William Lytle, and gave him a bond for a general warranty deed. In the early part of 1813, O'Bannon died; having made a will and appointed Robert Alexander and George T. Cotten his executors. The will was proved before the county court, of Woodford, Kentucky, at April term, 1813; and bond having been given by Cotten, he was duly qualified as executor. The other executor did not qualify. Cotten, as executor, on the 16th of July, 1813, conveyed to Lytle, by a deed of general warranty, the above land, and on the 21st of the same month and year, Lytle sold the land to Samuel McConaughy, and executed to him a deed of general warranty. From McConaughy deeds were executed to the other defendants, or to those through whom they claim, at different times, for parts of the same tract. On the 21st of December, 1816, Cotten obtained from the general land office the patent for the nine hundred and sixty-five acres in his own name, as "executor of the last will and testament of O'Bannon, deceased, and to his heirs in trust for the uses and purposes mentioned in the will, &c."

It is contended that the patent was fraudulently obtained by Cotten. But fraud is not proved. The caveat had been entered by Lewis, as the agent of the trustees, but as it now seems, without any authority on their part; and on investigation the patent was issued after it had been suspended for many years. No step seems to have been taken by the trustees to procure the patent in their own names in trust, or to prevent its being issued to Cotten.

The deed from Cotten to Lytle, it is contended, as a conveyance, was wholly inoperative and void.

At the time that deed was executed the fee of the land was in the government; and of course it could not be conveyed by the deed. But the year before its execution McConaughy took possession of the land as purchaser from Lytle, so that there was not only no adverse possession at the time the deed was executed, but the possession was under the right intended to be perfected by the deed.

It must be admitted that the will of O'Bannon does not specially authorise his executors to convey land, which he had previously sold. The words of the will are, "all other property as above mentioned, (including lands) to be sold and settled by my executors, with power to collect, sue, &c." O'Bannon's will was not proved and recorded in this state, as required by the 12th and 13th sections of the act of the 10th February, 1810, which gives effect to wills made out of the state, relating to real property within it.

The other objection to this deed, that the conveyance was by one executor, when two were appointed, it is unnecessary to examine; as the will gave no authority to convey the land in question. Although the deed of Cotten, when executed, did not operate as a conveyance of the land, yet it is contended that as the patent was subsequently issued, effect by way of estoppel was thereby given to the general warranty in the deed.

On the part of the complainants it is contended, that the deed being void and inoperative, as a conveyance, the covenant of general warranty annexed to it, is also void. Co. Litt. 365 a. That a warranty must have an estate whereupon it may work in the beginning. Co. Litt. 378 a. 4 Cruise's Dig. 294, sec. 16, part 3. That a warranty doth not give a right, but bindeth only a right so long as the same continueth. Co. Litt. 272 a. That a warranty itself cannot enlarge an estate. Co. Litt. 385 b. That a warranty ceases on the expiration of the estate to which the warranty is annexed. Co. Litt. 378 a. n. 1. That the

estate being avoided, the warranty annexed to it is also avoided. Co. Litt. 366 b. 367, 368 a. 389 a.

From the view which the court have taken of this case, it is not essential that the doctrine of estoppel should be examined. But as much research and learning have been shown in the argument of the complainants' counsel, it may not be improper to consider the points above stated.

That a warranty is limited by the nature of the estate conveyed, is unquestionable. And also that a warranty in a deed, void upon its face, is void. The warranty must have an estate upon which it is to operate, and a deed which does not purport to convey such an estate, though it contain a warranty, can never operate by way of estoppel. What is warranted? the title set out in the deed. And the deed must have upon its face all the requisites which the law requires. To make a valid conveyance under our law, the deed must be sealed, and have two subscribing witnesses, &c.

The argument of the complainants is, that unless the deed operate as the transfer of some title or interest when executed to feed the warranty, it is no estoppel. Now the converse of this position is the true one. Where a deed does convey title, the warranty can never operate as an estoppel.

In 4th Cruise's Dig., 270, sec. 58 and 59, it is said, "When an interest actually passes by a lien, there is no estoppel." "For the reason why estoppels were at any time allowed was, because otherwise, when the party had nothing in the lands, the deed must be absolutely void." 2 Thomas' Co. Litt. 298, it is said, "that upon every conveyance of lands, tenements, or hereditaments, as upon fines, feoffments, gifts, &c., releases and confirmations made to the tenant of the land, a warranty may be made, albeit he that makes the release or confirmation, hath no right to the land, &c.; but some do hold, that by release or confirmation, where there is no estate created or transmutation of possession, a war-

ranty cannot be made to the assignee." In note E, it is observed, "but the law is otherwise; for if A be seised of lands in fee, and B release to him, or confirm his estate in fee with warranty to him, his heirs and assigns, this warranty is good, and both the party and his assignee shall vouch."

In the same book, p. 486, it is said, "if the lease be made by deed indented, then are both parties concluded; but if it be by deed poll, the lessee is not estopped to say that the lessor had nothing at the time of the lease made." And under note L, "leases by estoppel are such as are made by persons who have no interest at the time, or at least no vested estate, but are to operate on their ownership, when they shall acquire the same." "And wheresoever any interest passeth from the party, there can be no estoppel against him." T. Co. Litt. 505. This doctrine is found in 4 Kent's Com. 98. "Leases may operate by estoppel when they are not supplied from the ownership of the lessor, but are made by persons who had no vested interest at the time." "But if the lease takes effect, by passing an interest, it cannot operate by way of estoppel." "The deed which creates an estoppel to the party undertaking to convey or demise real estate, when he has nothing in the estate at the time of the conveyance, passes an interest or title to the prior grantee, or his assignee, by way of estoppel, from the moment the estate comes to the grantor." "The estoppel works an interest in the land." "An ejectment is maintainable on a mere estoppel." And again, in the same volume, 448, Sir William Blackstone says, "that it prevails, (viz. that land cannot be conveyed while possessed adversely) in the code of all well governed nations;" for possession is an essential part of title and dominion over property. "As the conveyance in such a case is a mere nullity, and has no operation, the title continues in the grantor, so as to enable him to maintain an ejectment upon it; and the void deed cannot be set up by a

third person to the prejudice of his title. But as between the parties to the deed, it might operate by way of estoppel and bar the grantor. This is the language of the old authorities, even as to a deed founded on champerty or maintenance." Co. Litt. 369. Lord Hardwicke says, 1 Ves. 230, "a fine though it pass no estate estops the heir."

Lytle having purchased the land from O'Bannon, in his life time, and Cotten having obtained the patent, in his own name, as executor of O'Bannon, "in trust for the uses and purposes mentioned in the will," &c. there would seem to be no doubt that Cotten held the land in trust for Lytle, or those to whom he may have transferred it. There was no mention in the will, of this land, nor any trust created respecting it; nor, as before remarked, was there any general authority given to the executors to convey it. But by the act of the government, in issuing the patent, the trust became vested in Cotten, and his obligations arose, not from the will of O'Bannon, but from the patent. His being named as executor, and the reference to the will in the patent, may be rejected as surplusage or considered terms of description. He held the land in trust for those who were entitled to it. Of this there can be no doubt. And as a conveyance had been made by Cotten to Lytle, before the emanation of the patent, no reason is perceived why the warranty in such deed should not operate as an estoppel against Cotten and his heirs, and the heirs of O'Bannon.

If Cotten were now living, and refused to convey the title to Lytle, or his assignees, a court of chancery would compel him to do so. In making the conveyance, then, he only did what equity would have required him to do, after the emanation of the patent.

The defendants rely upon the statute of limitations and lapse of time.

In the case of *The Lessee of Whitney et al v. Webb and Westerhaven*, 10 Ohio Rep. 513., also in the case of *Ridley et al v.*

Hertman et al, same vol. 524, the Supreme Court held, that accumulative disabilities could not be set up under the statute. The court say, "the death of a person while laboring under disability, is entirely unprovided for." "The only alternative then, to which we can cling, is to say that such person stands upon the same footing as residents of the state, and that the lapse of twenty years from the time the cause of action accrued will be a bar to the assertion of the right. To say that it shall be twenty years from the death, will be going even beyond the statute of James, in which express provision is made for extending the period, not however to twenty, but only to ten years; and without which provision this advantage could not by construction have been given to the heir."

Had these decisions not been made, I should have inclined to the opinion, that as the statute had not run or began to run in the life-time of the ancestor, though the cause of action had arisen, the land descended to the heir unaffected by the statute; and that accumulative disabilities would be guarded against by holding, that the heir, though laboring under disability, was bound to bring his suit within twenty years. But it is not for this court to say whether the construction of the statute conforms to their views or not; it has been settled by the proper tribunal, and has become a most important rule of property; and as such we must regard it.

Now the land in controversy has been held adversely by *McConaughy* and those who claim under him, since July, 1813, the date of *Lytle's* deed. All the defendants hold under deeds duly executed; and whether we date their adverse possession on the land in controversy, from *Lytle's* deed, or the emanation of the patent to *Cotten*, it is equally clear that they are protected under the above construction of the statute. That statute bars the complainants, whether their right is represented, by the heir of *Thompson*, the last

survivor of the trustees; or by themselves under the trust deed; or as heirs of General Lawson.

Had the statute of limitations remained open for our construction, and we construed it as above intimated, which would not bar the complainants' right; still I should have been clearly of the opinion that they were barred by the lapse of time.

The counsel for the complainants have argued that a court of Equity can never give effect to the lapse of time, except in a case where the statute would bar an action at law. That time must always be applied by analogy to the statute; and that this analogy would be destroyed, if equity should give a greater effect to time, than could be given to it under the statute. And the case of *Larrow v. Beam*, 10 Ohio R. 498, is relied on as sustaining this position.

The court in that case say, "we do not know that there is any case in which the defence has been distinctly placed upon this ground, (lapse of time) where there was a statute of limitations in force applicable to the case." "If the party be guilty of such laches in prosecuting his title as would bar him, if his title were solely at law, he shall be barred in equity. But farther than this the courts have not ventured to go."

That statutes of limitations are binding on a court of equity, as they are on a court of law, is undoubted. In these cases equity may be said to follow the law. But there are many cases in which lapse of time will constitute a bar in equity, though at law the statute would not bar. The statute does not apply to the peculiar facts and circumstances of these cases. In 2 Story's Eq. 735, it is said, "a defence peculiar to courts of Equity, is that founded upon the mere lapse of time, and the staleness of the claim, in cases where no statute of limitations directly governs the case. In such cases courts of Equity act sometimes by analogy to the law; and sometimes upon their own inherent doctrine of discouraging,

for the peace of society, antiquated demands, by refusing to interfere, where there has been gross laches in prescribing rights, or long and unreasonable acquiescence in the assertion of adverse rights."

In *Smith v. Clay*, 3 Bro. Ch. Rep. 640, Lord Camden said, "A court of Equity which is never active in relief against conscience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence."

In *Cholmondeley v. Clinton*, 2 Jac. and Walk. 141, Sir Thomas Plumer said, "in courts of Equity of this country the principle has been always, as I shall hereafter show, strongly enforced. They have refused relief to stale demands, even in cases where no statutable limitation existed; and wherever any statute has fixed the period of limitations, by which the claim, if it had been made in a court of law, would have barred, the claim has been by analogy confined to the same period in a court of Equity." And again he says, "courts of Equity have at all times, upon general principles of their own, even where there was no analogous statutable bar, refused relief to stale demands," &c.

Where the statute applies, it is binding on a court of Equity, but in cases where the statute does not apply, the court acts upon its own principles. In *Piatt v. Vattier et al*, 9 Peters R. 413, the statute of limitations was insisted on in the argument, but was not set up as a defence in the answer, as was lapse of time. And the court held that as the statute was not pleaded they could not notice it, and decided the case against the complainant on lapse of time.

In that case the evidence did not show that Bartle, the assignor of the complainant, had been within the state, so as to bring him within the statute; and if the statute had

been pleaded, there can be no doubt that the decision would have been the same as was given. It was a case in which the court was asked to decree a conveyance on a doubtful equity, where there had been an adverse possession of more than thirty years. And yet the person through whom that equity was desired, was not proved to have been within the state during the adverse possession. The statute did not apply in such a case, and yet can any one doubt that the right asserted had become stale, and that relief was properly withheld?

It does by no means follow that the court must decree a title, where the statute of limitations does not bar. And yet this would seem to follow, from the argument of the counsel.

The case under consideration may strongly illustrate the principle. In June, 1794, Gen. Lawson, with the view of procuring a re-union with his wife, conveyed the equitable title to the land in controversy, and other real and personal estate to trustees, for the benefit of his wife, and under certain conditions, subject to her final disposition. The deed was executed, with the assent of the trustees, and some advice was given by one of them as to the disposition of a part of the land named in the deed; and there is no other positive evidence of any further action of the trustees.

On the strength of the above deed, Mrs. Lawson and her daughter returned to live with her husband; but in a few months, of choice or of necessity, again abandoned him. Some two years after the execution of the trust deed, Lawson assigned the land in controversy to O'Bannon, which he afterwards sold to Lytle. In 1797, Lewis, as agent of the trustees, though as appears without their authority, entered a *caveat* in the department of state against issuing a patent on Lawson's assignment, for any of the lands included in the trust deed. O'Bannon died, and his executor executed a deed to Lytle for the land, and he conveyed

to McConaughy. In 1816, Cotten, as executor, obtained the patent. Since, and indeed before eighteen hundred and thirteen, possession was taken of the land under Lytle. It has been made valuable by numerous farms having been opened on it, dwelling houses erected, and by orchards and other improvements; and now this trust deed is set up against the title of the occupants. The object of the deed having failed, it seems to have been abandoned by all the parties to it. They have all gone to their account. No action under the deed—except what has been stated, and recording a copy in Hamilton county, of this state, at whose instance does not appear—has been had, until the institution of this suit. And is this an equity to be enforced against the title of the defendants—an equity which has been permitted to lie dormant for nearly half a century—an equity which was founded upon the consideration named, and which, in a few months, entirely failed? There is no evidence that the defendants had notice of this claim until long after their titles were perfected. Possession has been held of the land twenty-nine years, twenty-seven of which elapsed before this suit was commenced.

I am aware that circumstances may prevent the effect of time on an equity asserted; and the court should always regard the excuses for a want of diligence. But in the present case no sufficient excuse has been alleged.

Some doubt may well be entertained whether the trust deed, having failed in its object, and no appointment under it having been made by Mrs. Lawson, could be carried into effect, if no adverse title could be set up against it.

Under the facts and circumstances of the case, the court think the complainants are barred by the lapse of time. And I should be clearly of this opinion, if the statute interposed no legal bar.

The bill must be dismissed.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—OCTOBER TERM, 1842.

EGBERTS v. DIBBLE.

A demurrer extends to the first error in pleading.

The statute of limitations of the state where the suit is brought, must be pleaded, and not the statute of any other state.

It is the law of the forum.

Inducement should consist of such facts as authorise an inference against the right asserted by the other party.

Mr. *Ten Eyck*, for plaintiff.

Mr. *Talbott* appeared for defendant.

OPINION OF THE COURT.

THIS is an action of debt, brought on a judgment of the Supreme Court of the state of New York. The defendant filed three pleas. 1. *Nul tiel record*. 2. Statute of limitations. 3. That plaintiffs were not citizens of New York. The plaintiffs took issue on the first and third pleas; and as to the second plea, say, that they ought not to be barred from a recovery, because they say, that at the time the action accrued to them, they were in parts beyond seas, to wit, in the state of New York, and that in May, 1841, they came from said parts beyond the seas into the state and

district of Michigan, and which coming was the first time they came to the district of Michigan after the accruing of the said cause of action; and that they commenced this suit within eight years after they came from beyond sea into this state and district, after the accruing of said cause of action, &c.

The defendant replied that plaintiffs ought not to maintain their action, because the plaintiffs and defendant were, at the date of the recovery, residents of New York, and did then and there reside, continually, for eight years, next succeeding the day of the date of said recovery. *Absque hoc*, that the said plaintiffs were in parts beyond seas, &c. traversing the replication of the plaintiffs.

The plaintiffs sur-rejoined, denying that they and defendant resided continuously in New York for eight years, next succeeding the date of said recovery, without re-affirming what is stated in the replication. To this sur-rejoinder defendant demurred, specially. 1. Because the sur-rejoinder does not tender an issue material out of or upon the traverse, but puts in issue the matter of inducement. 2. That the sur-rejoinder does not re-affirm what the defendant has in his traverse by his rejoinder denied. 3. Because the said sur-rejoinder is a negative pregnant, and that it departs from and abandons the matter set up in the replication, &c.

The plaintiffs insist that the defendant sets up in his rejoinder a substantive distinct fact, and that they were right in taking issue upon that fact, and that if the sur-rejoinder is defective, the plaintiffs are entitled to judgment, because the defendant's rejoinder is bad.

A demurrer applies to the first defect in pleading, although as in this case, the demurrer be filed to the sur-rejoinder.

The rejoinder of the defendant is bad. In this case, the suit being brought in the state of Michigan, the statute of limitations of New York cannot be pleaded, but the statute of Michigan. The act of limitations is the law of the forum.

In *Le Roy et al, v. Crowninshield*, 2 Mason, 151, it is said, "a plea of the statute of limitations of the state where the contract was made, is no bar to a suit brought in a foreign tribunal to enforce that contract; but a statute of limitations of the state where the suit is brought must be pleaded."

The statute of Michigan does not apply to persons beyond seas, which has been construed by the state courts, beyond the limits of the state. To avoid the plea of the statute, the plaintiffs state that they resided in the state of New York; that until 1841 they never came into the state of Michigan. To this the defendant rejoins that they both resided in the state of New York eight years, continuously from the time of the recovery, &c. Here the defendant sets up new and substantive matter as inducement to the traverse, which is not alleged by the plaintiffs, and is entirely different matter from that of the traverse. The inducement must be an answer to that of the opposite party's allegation, and must be sufficient to defeat that allegation. The traverse is but an inference from the inducement. Now the facts stated as inducement do not go to deny the plaintiff's action. They are no answer to it, and can authorise no inference against the plaintiff's right. The view of the pleader seems to have been to rely upon the statute of limitations of New York, and not the statute of Michigan. The matter of the rejoinder being defective, judgment must be entered for the plaintiffs.

JOHNSON v. UNITED STATES.

The act of 1790, limiting the prosecutions of certain offences to two years, applies to offences under statutes subsequently passed.

On a *habeas corpus* the court cannot look behind the sentence of the court, where it had jurisdiction.

The day laid in the indictment is not material, and the offence may be proved to have been committed at any other time.

Where there is a bar, under the statute of limitations, it should be pleaded.

Mr. *Howard* for the plaintiff.

Mr. *Bates*, district attorney, for the defendant.

OPINION OF THE COURT.

THIS is an application for a rule to show cause why a writ of *habeas corpus* should not be issued to bring up the body of the defendant, now confined in the penitentiary by the sentence of this court, for aiding and assisting in making counterfeit money. The indictment charged the offence to have been committed more than two years before the indictment was found.

The 31st sec. of the act of the 30th April, 1790, declares, "that no person shall be prosecuted, tried or punished, for any offence not capital, &c. unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, &c., provided that nothing herein contained shall extend to any person or persons fleeing from justice."

As the act under which the defendant was indicted and convicted, was passed after the above act of limitation was enacted, a question is made whether the limitation can apply to statutes subsequently passed. In the case of *Adams v. Woods*, 2 Cranch, 336, the court held the limita-

tion of the act of 1790, did apply to offences under subsequent statutes. By the act of the 28th February, 1839, the limitation on criminal prosecutions "for any penalty or forfeiture, was extended to five years." But the case before us comes under the act of 1790. And it is insisted, that as that act prohibits the punishment of the offender, where the prosecution is not commenced within the two years, the proceedings were null and void, and not merely erroneous; and that on this ground the prisoner should be discharged.

Where there is a want of jurisdiction apparent upon the record, the proceedings of a court are not valid. But there is no want of jurisdiction in this case. The court had jurisdiction of the offence, and if there was a bar under the statute, it should have been pleaded. No such plea was interposed, and the question is, whether the objection can be raised on a writ of *habeas corpus*. We suppose it cannot. By failing to set up the defence, the defendant waived it. And if this were not the legal effect of failing to set up the statute, it is clear that on the *habeas corpus*, the court cannot look behind the sentence of the court, where the jurisdiction is undoubted.

The time laid in the indictment is not material, and proof may have been made on the trial, that the prosecution was commenced within the limitation of the act. And the proviso in the statute, that it shall not run where the defendant absconded, is an exception which may have been shown by the evidence. In every aspect in which the case may be considered, there seems to be no ground on which the defendant can claim his discharge.

The motion is overruled.

SHERMAN v. CLARK.

Jurisdiction is taken from the damages laid in the writ and declaration, and not from the amount due, proved by the plaintiff.

A notice of the protest and non-payment of a note to the indorser, is good, if directed to a post office where the party is in the practice of receiving his letters, though it may not be the nearest post office.

A promise to pay by an indorser is presumptive evidence of notice, as it acknowledges a legal liability.

Mr. Seaman, for plaintiff.

Mr. Howard, for defendant.

OPINION OF THE COURT.

THIS action is brought against the defendant as indorser of a note. Proof of demand was given, at the bank, where the note was payable, and notice directed to Palmer post office. The amount of the note and interest, \$293, but the damages were laid in the declaration at six hundred dollars. On these facts a question is raised as to the jurisdiction of the court. But there is clearly jurisdiction, as that is taken from the damages laid in the writ, which exceeds the sum to which the jurisdiction is limited.

It was proved that at the time of the notice the defendant lived two and a half miles from the Palmer post office, to which the notice was directed. That he was post master of China post office, and that he was President of the St. Clair Bank, established in Palmer. Talbert, a witness, corresponded with the defendant, and in 1835 directed letters to him at Palmer. The notice was sent in March of that year. Defendant afterwards requested witness to direct to him at China. During the above year the defendant was a carrier of the mail in a steam boat, and called

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three times a week at Palmer, and as often at the China office. The defendant wrote a letter to the counsel of the plaintiff in which he said, that "he had not the means to pay then, but would be down shortly and would make some arrangement on the subject."

The court instructed the jury that it was not indispensable to send the notice to the nearest post office, if the defendant was in the practice of receiving letters at an office more remote from him. That if they shall find from the evidence the defendant was in the practice of receiving his letters at the Palmer office, and also at China, the notice being directed to either was sufficient.

The jury were also instructed that where there is a promise to pay by the indorser, it is received as presumptive evidence that notice was given in due time, so as to fix his liability. The jury found for the plaintiff.

TOOKER & TUBBATS v. THOMPSON ET AL,

If in the caption of a deposition the place where it was taken is stated, it is sufficient.

If the person who takes the deposition certifies that the place is more than a hundred miles from the place of holding court, and that he does not know of an agent of the plaintiff, &c. nearer, it is sufficient.

The commissioner who took the depositions, having been appointed by the court, who made the appointment a matter of record, a copy of the record, to make it evidence, requires the certificate of the presiding judge.

A witness may be sworn before or after his deposition is reduced to writing.

Messrs. *Joy & Porter* for plaintiffs.

Mr. *Fraser*, for defendants.

The defendants objected to certain depositions:

1. Because it does not appear that the depositions were taken one hundred miles from the place of trial.

2. It does not appear where the depositions were taken.

3. It does not appear that the person who took the depositions was appointed by the court to take depositions.

4. The witness should be sworn to testify the whole truth, and before the facts were stated.

By a rule of this court, all formal objections to depositions are required to be stated in writing, before the cause is taken up for trial, or such objections are considered as waived.

The above objections come within this rule, as formal.—But, if this were not so, the objections, with one exception, are unsustainable.

In his certificate, the person who took the depositions states that the witnesses live more than one hundred miles from the place of holding the court. This is sufficient. The place is named in the caption, and that complies with the statute. 5 Peters, 604. And it is stated that the defendants have no agent known to the commissioner residing within one hundred miles of the place of taking the depositions.

The objection as to the authority of the commissioner, if made in time, must have been sustained. The certificate of the clerk of the circuit court where he was appointed is in due form. The only objection to it is, that the presiding judge has not certified that the attestation is in due form. But this is essential to make the certificate evidence. The words of the act of Congress are, “the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form.”

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This, in terms, applies to the state courts; but the rule is equally applicable to the courts of the United States. The clerk certifies that the person taking these depositions was appointed commissioner, &c. This appointment, being a matter of record, is properly certified by the clerk. But the certificate of the presiding judge is made essential by the act where any matter or judicial proceeding is certified from the record. The words are, "the records and judicial proceeding."

The fourth objection, if made in time, would not have been sustainable. Whether an individual be sworn before he or the justice writes the deposition, cannot be material. If written before the oath, the mind of the witness is drawn specially to the language used, and he swears to it.

But on the ground that the objections under the rule of this court should have been indorsed on the deposition before the cause is called for trial, the objections are overruled.

WM. DWIGHT v. PEASE, JONES, AND JOHN CHESTER.

A promissory note given to two or more payees, who are not in partnership, must be assigned by all of them.

An assignment of one of two payees, at most, can convey but one-half of the interest in the note.

This does not enable the assignee to sue the drawer. A note cannot thus be cut up and suits against the drawer multiplied.

Mr. ———, appeared for the plaintiff, and Mr. *Talbott*, for the defendants.

OPINION OF THE COURT.

This action was brought upon the following promissory note: "Detroit, January 1st, 1837. Two years after date,

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I promise to pay to the order of Walter Chester, and Pease, Chester & Co. one thousand and five hundred⁷/₁₀ dollars, for value received, at the Farmers' and Mechanics' Bank of Michigan, with interest. Signed, John Chester. Indorsed, Pease, Chester, & Co., and also D. E. Jones in blank."

The declaration contained three counts, to the first of which there was a demurrer. This count states that one John Chester, on the 1st of January, 1837, made his note payable to order of Walter Chester, and Pease, Chester & Co., and that Pease, Chester & Co., under their partnership name, indorsed and delivered the said note to the plaintiff. John Chester, the maker, was a member of the firm of Pease, Chester & Co. Demand of the note when due, and notice to the defendants, was proved.

Walter Chester, one of the promisees in the note, seems not to have indorsed it, and this is fatal to the right of the plaintiff. The interest of the promisees is joint in the note, and not being in partnership, they must each transfer the note. *Chitty on Bills*, 123; *Tayl.* 55; *Carvick v. Vickery*, Doug. 653; *Jones v. Radford*, 1 Comp. 83; 21 Com. Law Rep. 41.

Only one-half of the note was transferred by the indorsement of Pease, Chester & Co., and this does not give a right to their or any subsequent assignee to sue on the note. Recourse against the maker cannot thus be divided and suits multiplied. The plaintiff seeks by this action to recover the full amount of the note against the defendants, as indorsers. But as he holds but one-half of the note under the assignment, the indorsement, at most, can only be evidence of that amount.

The declaration is defective in not averring that Walter Chester, one of the payees, did indorse the note. Demurrer sustained. The plaintiff dismissed his action.

HYSLOP AND HYSLOP v. JONES.

A personal notice of the demand and refusal of payment of a note, to charge the indorser, may be served at any place. And if it be proved that it was given at one place or another, it is sufficient.

Where the indorser lives in the city, the notice must be served on him personally, or at his place of business or residence.

But a notice deposited in the post office, which was in fact received by defendant in due time, is sufficient.

An averment in the declaration that the note when due was presented to the bank for payment, to wit, 23d of July, 1841,—the words from, to wit, &c. were held to be surplusage.

Messrs. *Douglass* and *Walker* for plaintiffs.

Mr. *Jay* for defendant.

OPINION OF THE COURT.

THIS suit is brought against the defendant as an indorser of two promissory notes.

Mr. Wells, the Notary Public states, that the first note for one thousand dollars becoming due the 3d of July, 1840, was presented to the bank on that day for payment, and was not paid; and that he gave notice to the defendant personally, at his residence or at his place of business.

The second note became due the 3d of July, 1841. The declaration averred that the note was presented at the bank when due, to wit, the 23d of July, 1841. After making demand of payment at the bank, the Notary states that he hunted two hours for the defendant's residence in the city, but could not find it, nor his place of business; and he left the notice in the post office. Defendant on Monday ensuing saw deponent in the street, when they had some conversation on the subject.

Objection being made to the service of notice of the non-

payment of both notes; the court instructed the jury as to the first note, that the notice was sufficient. It was served on the defendant personally in due time, either at his residence or place of business. The service being personal, it is immaterial as to the place of service.

In regard to the notice on the second note, it was not left at the defendant's place of business or his residence, but in the post office. The leaving the notice in the post office of the city in which the indorser lives, is not sufficient. It must be served on him personally, left at his place of business or residence. But if by leaving the notice in the post office, the defendant, in fact, received it in due time, it is sufficient. And of this fact the jury must determine from the evidence.

The words, "to wit, the 23d of July, 1841," in the declaration, the court considered as surplusage, and inconsistent with the preceding averment, that the note was presented when due.

The jury found for the plaintiffs.

SPAFFORD ET AL V. GOODELL.

On an action for an escape, the sheriff cannot take advantage of an irregularity in the process, which does not render it void.

The deputy of the marshal is a sworn officer, known to the law, and he may return, as deputy, the process served by him. Such has been the uniform practice.

A sheriff who receives as jailor, a person arrested by the marshal, is bound to keep the prisoner under all the responsibilities, as if he had been arrested under state process.

An escape on final process, subjects the sheriff to damages to the amount of the injury received by the plaintiff.

This injury is measured by the amount of property possessed by the defendant, not exceeding the sum named in the execution.

Where the defendant is wholly without property, nominal damages, only, can be recovered against the sheriff.

Messrs. *Goodwin & Collens* appeared for the plaintiffs, and Messrs. *Witherell & Buell*, for the defendants.

OPINION OF THE COURT.

THIS action is brought against the defendant, as late sheriff of Wayne county, in this state, charging him with an escape. On the 22d June, 1838, a judgment was obtained in this court, against James Hale, by the plaintiffs, for seventeen hundred dollars. A *capias ad satisfaciendum* was issued on the judgment, the 11th February, 1839, which was returned *cepi corpus*.

An objection was made to the execution, on the ground, that in pursuance of the statute of Michigan, Revised Stat. 453, sec. 15, it did not require personal and real property to be taken, before the body; but the objection was overruled. The sheriff who, under the act of Michigan, received the defendant into custody, cannot object to the irregularity of the execution. It was not a void process, and collaterally advantage cannot be taken of an irregularity, which does not show that the process was wholly void.

It was also objected that the return on the execution was not made by the marshal, but by his deputy, and 2 Cain, 10, Story on Agency, 139, n. 2, were cited. A deputy marshal is an officer known to the law, and it is the general practice, long sanctioned by the courts, for the deputy to make return of process served by him. It might be more technical to return the same in the name of the marshal, but the custom has been otherwise. The deputy is a sworn officer, and the court think that the return is good. They would even now permit the marshal to amend the return, if it were essentially defective.

The defendant, as sheriff, was bound to keep the defendant committed to his custody by the marshal, under the same responsibilities, as if the arrest had been made under

state process. But on the same evening of the commitment, the sheriff released Hale, on his giving a bond as required by the Revised Stat. 682, chap. 8; and this bond was offered in evidence. The act under which this bond was taken, does not apply to the courts of the United States. It was passed subsequently to the act of 1828, adopting the state laws in regard to the practice of the courts of the United States, and it has not been adopted, expressly, by a rule of court. Even under the statute, the bond is liable to objections, but these need not be considered.

Evidence was offered to show the amount of the property possessed by Hale, the defendant in the execution; and also rebutting evidence, conducing to show that he was embarrassed and owned no property.

The court instructed the jury, that the escape being proved, the plaintiff was entitled to recover from the defendant damages to the extent of the injury which resulted from the escape. That if Hale had property which might have been applied in discharge of the execution, the plaintiffs should recover the full sum called for in the execution. But if the property was not liable to the execution, by reason of prior liens, that the plaintiffs could only recover nominal damages. That the damages could not exceed the property of Hale. That his commitment was a means of coercing payment, and if he were wholly without the means of payment, the damages must be nominal. The jury found for plaintiffs; on which a judgment was entered,

GRANT v. HAMILTON.

At common law, a wager, fairly made, was recoverable.

If the money was paid, it could not be recovered back again.

But, under the statute of Michigan, money lost at play, or on a horse-race, &c. may be recovered.

Under this statute, an action may be maintained in the circuit court.

Messrs. *Howard & Romeyn* for the plaintiff.

Mr. *Joy* for defendant.

OPINION OF THE COURT.

THIS action is brought to recover back a wager lost and paid on a horse-race. In the Revised Statutes of Michigan, 210, an action is authorised to recover money lost at play, horse-racing, &c.

At the common law, where there was no concealment or fraud, a wager was recoverable. 3 Term. 693. 5 Burr. 2802. Cowen, 37, 735, 29.

In *Burn v. Hicks*, 4 John. 434, the court said, "the law appears to be settled that some wagers form the proper ground of an action. It is worthy of remark, however, that as often as this question has been raised, there is scarcely a judge in England, from the time of the case of *De Costa v. Jones*, down to the present day, who has not expressed his regret that such was the law." In *Campbell v. Richardson*, 10 John. 405, where A set up a mark to shoot at, and it was agreed between them "that B should pay A 25 cents for every shot he fired, but if B hit the mark then A should pay him 20 dollars—it was held to be a legal contract, and that B, having hit the mark, might maintain an action against A, to recover the 20 dollars."

We think the principle was wrong, which authorised a

Sackett v. Davis and Whitwood.

recovery in such cases; but the law seems to be established. At common law, if the money won was paid, it could not be recovered. But the statute of Michigan alters the common law in this respect. It authorises a recovery of money paid on a wager. And, it would seem, that no one can doubt the policy of this law. It is urged that this is a case where both parties committed a violation of the law and sound policy, in making the wager, and that in such cases it is the policy of the law to aid neither party, but leave them without remedy against each other. This argument would not be without force, if the statute did not expressly authorise the recovery.

The argument that this is a penal statute, and cannot be enforced by this court, is also unsustainable. So far as regards this action, to recover back the money paid, it is not for the enforcement of a penalty. The rights of the parties and their remedies, when regulated by the local law, may be prosecuted in the courts of the United States, the same as in the state courts. We cannot give effect to the criminal laws of the state; but this act, and especially this suit, is not of that character.

If the jury shall find that the money was lost and paid by the plaintiff, as alleged in the declaration, they will find the amount paid to the defendant.

Verdict for the plaintiff.

SACKETT v. DAVIS AND WHITWOOD.

On a note payable to Thompson or bearer, suit may be brought in the name of the bearer.

He is not an assignee, and need not aver in the declaration the citizenship of Thompson.

Such a note is not within the act of Congress, in regard to assigned instruments.

Messrs. *Douglass* and *Walker* appeared for the plaintiff.

OPINION OF THE COURT.

THIS action was brought upon four promissory notes, described as payable to William P. Thompson, or bearer. The declaration alleges the citizenship of the parties to the suit; but the citizenship of Thompson is not averred, and on this ground a question of jurisdiction is raised.

If the plaintiff had sued as assignee, this objection would be fatal, as it would be necessary to show that suit might have been brought in this court by the assignor, at the time of the assignment. But the plaintiff does not sue as assignee, but as holder of the notes. The defendant promised to pay to Thompson, or bearer. Now the promise is to pay to either, and either may bring the action in his own name. The property in the note passes by delivery. And in such a case nothing more need be shown by the person who sues, than that he is the holder of the notes, or the bearer. The case is not within the provision of the act of Congress in relation to the assignment of notes, &c.

The ground taken is not sustainable. Judgment for the plaintiff.

ROOT v. GODARD.

Notes given by a corporation in violation of law are void.

Public laws limiting corporate powers are notice as well to persons out of the State where the laws were passed, as to those within it.

Such notes being void in their inception, are void in the hands of a bona fide holder.

Messrs. *Fraser* and *Joy* for plaintiff.

Mr. *Romeyn* for defendant.

OPINION OF THE COURT.

THE facts in this case are agreed, and the argument is made as on a motion for a new trial.

The suit is brought on certain notes by the plaintiff as holder, which are alleged to be void. They were issued by the "Bank of Saline," and the "Bank of Brest," and are subject to the act of the 28th March, 1836, "called the safety fund act." This act provides that no monied corporation subject to it, "shall issue any bill or note of the said corporation, unless the same be made payable on demand, and without interest."

These notes are in contravention of this act, and it is insisted that they are consequently void.

There can be no doubt that a contract entered into by a corporation, that has no powers except those which are specially given to it, is void, if made in violation of law. The notes in question are not made payable on demand, but on time; and this being against the statute, makes the notes void.

Are the notes void in the hands of a bona fide holder without notice. If they were void *ab initio*, they must be held so in the hands of such a holder. *Wiggin v. Bush*, 12 John. 310. But the plaintiff is not a holder without notice. The act of 1836, which limits and regulates the corporate powers of the above banks, is a public law, and is notice to the world in all cases where the banks exceed their powers. And this applies to persons out of the State of Michigan, the same as to those within it.

If the plaintiff had notice of the illegality of the notes in their inception, such illegality can be shown by the indorser to defeat the action. 3 Kent, 80. Chitty on Bills, 92, 112. The indorsement of the notes, under the circumstances, created no new liability, and conferred no rights.

Judgment for the defendant.

DWIGHT v. HUMPHREYS AND BACON.

A bill must be signed by counsel, or it is demurrable.

But a signing on the back of the bill is sufficient. The court, as a matter of course will give leave to amend the bill so as to obviate the objection made by the demurrer.

Mr. *Romeyn* for complainant.

Mr. *Bates* for defendants.

OPINION OF THE COURT.

THIS is a bill to foreclose a mortgage. The defendants demur on two grounds.

1. That the bill is not signed by counsel.
2. That Bacon having no interest in the foreclosure, should not have been made defendant.

In regard to the first ground, it is not denied, that the English practice requires a bill to be signed. This practice seems to have been introduced by Sir Thomas More, who made an order to that effect. And if a bill be not so signed, it is demurrable. 2 Cooper Eq. Pl. 18. Story's Eq. Pl. sec. 47. But in this case the bill is indorsed by counsel, and that is a sufficient signing within the rule.

It seems that Bacon is not a party to the mortgage, nor does it appear how he is interested in the decree. No decree is prayed against him. The objection to the bill on this ground may be obviated by an amendment, and leave is given to amend the bill.

GASSETT ET AL v. PALMER & CLARKE.

It is sufficient to state the title of the court in the caption of the declaration.
The venue if substantially laid is sufficient.
And so of other averments in the declaration.

Messrs. *Joy & Porter*, for plaintiffs.

Messrs. *Romeyn & Lee*, for defendant.

OPINION OF THE COURT.

THIS is an action of assumpsit on a note. To the first count in the declaration the defendant demurs, and pleads *non assumpsit* to the other counts.

To the first count it is objected that the caption of the declaration is insufficient, as it does not state in what circuit court of the United States it was filed.

The declaration commences, "circuit court of the United States, District of Michigan;" and then the names in which the parties contracted is stated and their citizenship alleged, which is followed, (speaking of defendants,) citizens of "the state of Michigan, against whom the declaration is filed." This we think is sufficient. The caption names the court in which the suit was commenced, and the declaration filed.

It is also objected that the *venue* is not sufficiently stated. The *venue* is laid "at Boston, in the state of Massachusetts, to wit, at Monroe, in the county of Monroe, and district aforesaid, and within the jurisdiction of this court." This is sufficient. The third objection, "that no time nor place is stated in the first count for the promise of the defendant to pay to the order of Henry Gassett & Co.," is without foundation. The promise is laid at Boston, aforesaid, to wit, at Monroe, within the district aforesaid, and within the jurisdiction of the court, and the note is set out.

George Fry v. H. Rousseau.

It is again objected, there is no allegation that Henry Gassett & Co. are the plaintiffs, or that they constituted the firm at the date of the note. The names of the firm are expressly stated, as constituting the firm to whom the note was given. So that it is unnecessary to say, whether it was essential for the plaintiffs to allege their names beyond the firm, as stated on the face of the note.

The demurrer is overruled.

GEORGE FRY v. H. ROUSSEAU.

Where an action is brought by the assignee of a promissory note or bill, the declaration must show that the assignor could have sued in this court.

A note for a certain sum payable in current bank notes is not negotiable.

Mr. *Hand*, for the plaintiff. Mr. *Butler*, for defendant.

OPINION OF THE COURT.

THIS action was brought upon the following note:

“Six months after date, I promise to pay to the order of W. T. Williard, at the Bank of Michigan, in Detroit, Michigan, six hundred and thirty-seven dollars and fifty-six cents, for value received, in current bank notes, receivable at the counter of said bank.”

To the first count in the declaration the defendant demurred specially.

1. Because the statement in the declaration does not show, that the court has jurisdiction of the cause. It contains no averment that the original promisee, W. T. Williard, through whom the plaintiff claims to recover, is an

Astrom et al v. Hammond, Auditor, &c.

alien or citizen of another state. This is a fatal objection. "Where a suit is brought against a remote indorser, and the plaintiff in his declaration traces his title through an intermediate indorser, without showing that this intermediate indorser could have sustained his action in the courts of the United States, those courts have no jurisdiction." *Mallen et al v. Torrence*, 9 Wheat. 537. *Bank of Kentucky v. Wistar et al*, 2 Peters, 320. These decisions are made under the 11th section of the Judiciary Act of 1789, which provides, that "no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

The other ground of demurrer is, whether a note to pay a sum of money in current bank paper, is negotiable.

There is nothing in the Michigan statute which regulates the negotiability of promissory notes, variant from the English rule. A note to be negotiable must be payable in money, Chitty on Bills, (ed. 1839,) 152. This point was considered and decided in *Hosbrook & Seaman v. Palmer & Clark*, 2 McLean's Rep. 10.

The demurrer is sustained on both grounds.

ASTROM ET AL v. HAMMOND, AUDITOR, &c.

Land purchased from the United States and paid for, is liable to be taxed.

And this applies to estates legal and equitable. The final certificate can no more be disregarded by the government than a patent.

The executive power cannot be revised and corrected by the judicial.

Matters of form and discretion are for executive determination.

An unconstitutional law can afford a justification to no one.

Astrom et al v. Hammond, Auditor, &c.

Messrs. *Douglass & Walker* and *Romeyn*, for complainants.
Messrs. *Norvell & Goodwin*, for defendant.

OPINION OF THE COURT.

THE complainants state in their bill that they purchased certain lands of the United States in the state of Michigan, the patent for which was issued the 1st May, 1839. That previous to the emanation of the patent, though subsequent to the entry of the land, the state of Michigan imposed a tax on the same. This tax it is alleged the state could not impose, as the land belonged to the United States, until the fee was vested in the purchaser by a patent. That the ordinance of 1787, and the act which admitted Michigan into the Union, prohibit the state from taxing the lands of the United States. The proceedings in the assessment of the tax are also alleged to have been irregular, and an injunction is prayed, &c. The case was argued as on a demurrer to the bill.

The counsel for the complainant insist that any restrictions on the state, contained either in the ordinance or in the act admitting the state into the Union are void, as Michigan was admitted into the Union on the same footing as the other states; and that any restriction on the exercise of its sovereign power is void.

It is admitted that the imposition of a tax is an exercise of sovereign power. This is sometimes done indirectly by vesting the right to tax, for certain purposes, in a corporation. But the act is done under the sovereign authority.

The inhibition on the state in regard to taxing the lands of the United States, does not rest upon an act of Congress, but upon a compact made between the general government and the state, and this agreement does not divest the state of any attribute of sovereignty, but withdraws a certain property from taxation for a limited time, and for certain

reasons. No one doubts the competency of the state and the federal government to make such a compact; and it can only be dissolved or modified with the consent of both parties. This does not impair the sovereignty of the state, as the power of taxation remains as before the compact. It is not unusual for the state, on grounds of public policy, or for a consideration paid, to exempt from taxation certain property. This is often done in grants to corporations, but no one supposes that this is a cession of a part of the sovereignty of the state. This question was considered somewhat at large in the case of *Spooner v. McConnell et al.*, 1 McLean, 345, and it need not again be discussed.

In 1832, the land in question was entered and paid for by the purchaser, and by reason of the great press of business in the land office, it is understood the patent was not issued until 1839. But there can be no doubt that the interest of the purchaser, whether it be equitable or legal, was liable to taxation. All property, by whatever name it may be denominated, is liable to be taxed. Until the patent is issued the purchaser has not the legal title, but having made his entry of the land and paid for it, the government can no more dispose of the land to another person, than if the patent had been issued. The final certificate obtained on the payment of the money, is as binding on the government as the patent.

That the statute of 1836 imposed a tax on these lands, has been settled by the state tribunals. The assessors were required to examine the land office of the United States, to ascertain what lands had been entered, and they were set down for taxation, so that the only question open is as to the power of the state; and that it has this power, as before remarked, there seems to be no doubt.

Lands thus purchased descend to the heirs, and do not go to the administrator. They are treated as real estate, and in some states are liable to be sold on execution, before the

patent is issued. When the patent issues, it relates back to the entry, and makes good any conveyance the purchaser may have made.

In Ohio, it has often been decided that lands are liable to be taxed by the state before the patent is obtained; and this has embraced land under the credit system, before it was paid for. So lands located by Virginia military warrants, are liable to be taxed before the patent.

But whether, on the face of the bill, the court have jurisdiction, is the important question to be considered.

It does not follow that there is no jurisdiction, from the mere fact that the defendant is auditor of state. No suit can be sustained against a state; but an unconstitutional law affords no justification to a state officer for an act injurious to an individual. The officer is not the state, and can set up no exemption under it, unless he act within the authority of law. But the judiciary cannot exercise a revisory proceeding over executive duties. In carrying a law into effect, the executive must necessarily construe it, and it is not for this or any other court to say that there is error in the construction, and a different course must be pursued. It is true, if an act be done without the authority of law, the individual that acts is responsible; and where the mischief would be irremediable, an injunction may be interposed. But, it is only in such a case that the judicial power could be exerted. In all matters of discretion, and in regard to the forms of proceeding, it is clear, that executive acts cannot, in any form, be drawn in question by the judicial power. This power is limited to cases where by the exercise of the executive functions an injury is done to an individual; and in such cases there is a remedy at law.

Upon the whole, we think that the demurrer to the bill must be sustained. We think the tax was properly imposed by the state, and it does not appear from the bill that the errors stated in the assessment of the tax are of such a

character as to produce great mischief, should the land be sold for the taxes. We see no probable result from the proceeding, which may not be remedied by an action at law.

WHITE v. HOW ET AL.

The act entitled "an act to organize and regulate banking associations," approved March 15th, 1837, is constitutional.

Under the above act, the directors are liable in their individual capacities in the first instance, if the debts of the institution exceed three times the amount of stock paid.

The directors are liable for all excess of debts above three times the amount of capital stock paid, and also for all deficits occasioned by the insolvency of the bank.

If a director protests against certain loans, at the time they were made, he is not liable, as director, in his individual capacity for such loans.

Where the plaintiff seeks to make the directors liable for excess of loans, &c. the declaration must aver the amount of such excess.

The amendatory bank law, which took effect the 30th December, 1837, somewhat modifies the prior law.

In the first law, the legislature reserved the power to dissolve or modify the charters under it, at their discretion.

But acts under the first law cannot be so changed by the second as to increase their responsibility.

This question, however, is not involved in the case.

The act of insolvency fixes the responsibility of the directors under the new law.

The insolvency of the bank occurred long after the amendatory law took effect.

OPINION OF THE COURT.

This suit is brought against the directors of the Saline Bank, established at Saline, in this state. In his declaration the plaintiff states, that on the 28th August, 1837, at Saline, books were opened to receive subscriptions of stock for a bank, to be called the Bank of Saline, with a capital stock, &c. under the act entitled "an act to organize and regulate banking associations," approved March 15th, 1837; and that subscriptions for stock were then and there received. That on the 16th of October, 1837, defendants,

with one Silas Finch, now deceased, and one Morgan L. Collins, who is a citizen of Ohio, were elected directors of said banking association, and then and there entered upon their duties as directors. That a president and cashier were elected, and that the defendants, claiming to have complied with all the provisions and requirements of the above act to constitute a body corporate, to wit, on the 5th December, 1837, had a large amount of notes engraved, which were filled up and signed by the cashier and president, and commenced doing business as a banking association, and continued such business until the 1st September, 1838, when said bank failed, and ceased paying its notes, debts, and liabilities in specie, and also then and there ceased doing business as a bank, and became insolvent, and is still insolvent. That the defendants, as directors, became subject to an act entitled "an act to amend an act entitled an act to organize and regulate banking associations, and for other purposes," approved 30th December, 1837, and which took effect the 10th January ensuing. And the plaintiff avers that he is the bearer and legal owner of the notes of said bank to the amount of fifteen hundred dollars, &c.

Two general counts were added to the special count.

The defendants filed a general demurrer.

In the argument the defendants insist—first, "that the laws under which the Bank of Saline was organized are unconstitutional."

The constitutionality of these acts was considered and decided by this court, in the case of *Falconer & Higgens v. Campbell et al*, reported in 2 McLean's Reports, 195, and being satisfied with that opinion, we deem it unnecessary again to examine the question.

The second ground of objection is—that "the declaration does not show that the defendants, as directors, are liable for the debts of the bank, declared on."

The 25th section of the act of the 15th of March, 1837, provides, that "the total amount of debts which such (banking) associations shall at any time owe, exclusive of property deposited in the bank, shall not exceed three times the amount of capital stock actually paid in and possessed; and for all excess and all deficits occasioned by the insolvency of such bank, the directors, in the first place, shall be liable in their individual capacity, in the full amount of their real and personal property; and each other stockholder shall thereafter be also liable to the amount of stock which he shall hold in such association, in proportion to his or her amount of stock: provided, that any director who, if present, shall enter his protest, or, if absent, shall within five days after his return to said bank, enter his protest against certain loans, discounts, or issues, shall not be liable, further than other stockholders, on such loans, discounts, or issues."

Under this section, it is contended that the defendants, as directors, can only be made liable for excess of debts incurred by the bank beyond the limitation imposed. And this construction is not controverted by the plaintiff.

That part of the section which imposes a liability on the directors, contemplates two distinct grounds on which they are to be charged: 1st. For all excess of debts above three times the amount of capital stock paid in; and, 2d. for all deficits occasioned by the insolvency of the bank.

In this view, the directors are liable for all excess of debts, without regard to the insolvency of the bank; and they are responsible for all deficits, in case of insolvency, without reference to excess of debts incurred. The words seem to be susceptible of no other construction. If the section intended to make the directors liable for excess of debts only in case the bank were insolvent, a different phraseology would have been used. But they are made

liable for "all excess of debt and all deficits occasioned by the insolvency of the bank."

Excess of debts beyond the limitation may be incurred, and yet the bank may remain solvent; and it may become insolvent without incurring any obligation beyond three times the amount of its capital stock. And can it be doubted that in either of these cases the words cited make the directors liable; in the one case for the excess of debts, and in the other for the amount of deficits. If we are to judge of the intention of the legislature by the natural import of the words used—and I know of no other rule of construction—this must be the result. The proviso only exonerates a director from liability, except as a stockholder, from those debts accruing from "loans, discounts or issues," against which he has protested.

There is then nothing in the proviso to modify or restrain the liability of the directors on the happening of the contingencies named, except as to debts against which a protest has been made.

But there is no liability of the defendants under this section shown in the declaration. It is neither averred that an excess of debts, beyond the limitation, to the amount of the plaintiff's demand was incurred, nor that the deficit on the insolvency equalled that sum. That the bank became insolvent is alleged, but there is no averment as to the amount of the deficit. In this respect the declaration is defective. The action being in the nature of a penalty, all the grounds on which the liability was incurred should be specifically stated.

But it is insisted that the liability of the defendants attaches under the amendatory bank law of the 30th of December, 1837, which took effect the 10th of January following.

The 21st section of that act provides, "that the total amount

of debts which such banking association shall at any time owe, exclusive of property deposited in the bank, shall not exceed three times the amount of capital stock actually paid in and possessed; and for all debts of such banking association, the directors thereof, if such association shall become insolvent, in the first place, shall be liable in their individual capacity to the full amount which such insolvent association may be indebted," &c.

The bills on which this action is founded bear date the first of January, 1838, and as no time is averred when these bills were issued by the bank, it is insisted that the day of their date must fix the time of their emission. And that as this was prior to the amendatory law, there can be no liability of the defendants under the above section. That from the nature of this law it must receive a strict construction. That at the time the debt set up by the plaintiff was incurred by the bank, the law then in force imposed a limited and different liability on the defendants, which cannot be increased or modified by the amendatory law. That the legislature had not the power to give the second act a retrospective effect; and if they had such power, that in no part of the act does it appear that such an effect was intended to be given to it.

On the other side it is contended that the power reserved by the legislature in the first law to "alter or amend the act, and to dissolve any association to be incorporated under its provisions, by a vote of two-thirds of each house," places the whole charter under legislative discretion.—That if the legislature may dissolve the charter, they may change it so as to increase or modify the liability of the defendants, as well as it regards past as future transactions.

The power reserved in the first law may be exercised at the discretion of the legislature. Under it the charter may be dissolved or modified, but acts which were in themselves

innocent, or involved only a limited responsibility, cannot be essentially changed by subsequent legislation. But it is not perceived how this principle is involved in the present case.

Under the amendatory law the directors are made responsible for the debts of the bank, on its becoming insolvent. And it appears from the declaration that the Saline bank became insolvent the first of September, 1838. This was long after the amendatory law took effect. The act of insolvency fixes the responsibility of the defendants. We must look to that act, and not to the time the debts of the bank were contracted. Without reference to the time the debts were incurred, the act declares if the bank shall become insolvent, the directors shall be liable for the full amount of its debts. Now it can be a matter of no importance when the debts were contracted. The Saline bank does not appear to have become insolvent by issuing the notes on which this action is founded. It did business up to the first of September, 1838, when it became insolvent. If the act of insolvency, on which the liability of the defendants attaches, had occurred before the amendatory act took effect, the objection of the defendants' counsel would be unanswerable.

For aught that appears, the notes in question were properly issued by the bank, for its business was continued many months afterwards. From the face of the declaration, the bank must be presumed to have been in a solvent state, not only when these notes bear date, but on the 10th January, 1838, when the amendatory law took effect. The defendants, then, were the directors of a solvent bank, when this law prescribed their duty. Their functions were discharged under it, and they were subject to all its provisions. Eight months after the law was in force the bank became insolvent, and under the act they were made liable, by this insolvency, for the debts of the bank. Now would it not be

a most strange and forced construction, to hold, that they are only liable for debts contracted after the law took effect?

The law declared, if the bank became insolvent under their management, they should be responsible for all its debts. And this provision applies as well to banks in operation, as to banks that might afterwards be established. If this be not the true construction of the act, the provision was worse than useless in regard to existing institutions. If the directors under it can only be held liable for debts contracted after the law took effect, the main object of the legislature will be defeated. They unquestionably intended to secure a faithful discharge of duty by the directors of banks in operation. And no hardship is perceived in applying the provisions of the law to existing banks. If the insolvency existed before the law took effect, the directors could not be held liable under it. But if the insolvency occur under the law, why may they not be held responsible. They were aware of the responsibility under which their duties were discharged, and if, with their eyes open, they incur the penalty, ought it not to be enforced against them?

No retrospective effect is given to the law by this construction. The contingency on which the liability attaches happens under the law. And the debts of the bank then existing, are the only debts for which the directors are liable. They knew the amount of the debts when the law took effect; and the bank being then solvent, they were bound to keep it so. And if, by increasing its responsibilities, they reduced it to insolvency, are they not justly, as the law provides, bound for its debts. The time at which those debts were contracted is not referred to in the law, nor is it of any importance. The time of the insolvency only is important. This makes the directors responsible for the existing debts of the bank.

The objection that the special count does not aver that

the notes described in it were neither presented to the bank, nor paid by it, seems not to be well taken.

The general averment in the conclusion of the declaration that the bank had not paid, though often requested, &c., is sufficient under the circumstances of the case. Indeed the averment of insolvency would seem to render unnecessary a presentation of the notes. The organization of the bank is well alleged in the special count. And as this count is deemed sufficient to maintain the action by the court, the objections to the general counts will not be examined.

It is objected that the remedy of the plaintiff is in equity and not at law. The 42d section of the act to provide for the voluntary dissolution of corporations, &c., approved April 15th, 1839, provides that "whenever a creditor of a corporation shall seek to charge the directors, trustees, or other superintending officers of such corporation, or the stockholders, on account of any liability created by law, he may file his bill for that purpose, in the court of chancery, which shall possess jurisdiction to enforce such liability, and may proceed thereon as in other cases," &c.

This law gives jurisdiction to a court of chancery, in a case like the present. But this does not take away the common law jurisdiction, which gives an appropriate remedy.

If the creditor wishes to prosecute the directors of the bank only, he must bring his action at law. A remedy by bill in chancery subjects him to delay, and a distribution of the assets of the bank. By the 43d section of the above act, if the bank has no effects, a decree may be made against the directors. But the 44th section provides that, "upon a final decree upon any application to restrain a corporation, or upon any bill filed against the directors or stockholders, the court shall cause a just and fair distribution of the proceeds of the property and effects of such corporation, to be made among its fair and honest creditors, in the order and proportion herein before provided," &c.

This remedy then is very different from the remedy by action at law. The personal liability of the directors for the debts of the bank, "in the first place" as provided by the act, is not enforced by a chancery proceeding. But if there were no difference in this respect, the remedy at law would not be impaired by the relief which a court of chancery may afford. In no part of the act is it provided that the relief by bill shall be exclusive.

It is insisted if an action of law may be sustained under the statute, it should be brought against each director individually.

Under both statutes, the directors, on the insolvency of the bank, are made jointly liable for its debts. They should then be sued jointly, as has been done in this case.

But it is objected, that on a joint liability of individuals, all must be sued. And that in the present case, Collins, who was a director, and jointly liable with the other defendants, has not been sued. Collins, it is averred in the declaration, is a citizen of Ohio, and consequently not within the jurisdiction of the court.

The 1st section of the act of Congress of 1839 obviates this exception. It expressly authorises the court to take jurisdiction "and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree entered thereon shall not conclude or prejudice other parties not served with process." But as the act authorises a party not served with process, and who may be without the jurisdiction of the court, voluntarily to appear, it is insisted that the process should be against such party, otherwise he cannot claim the benefit of the statute.

Under the limited jurisdiction of this court, the plaintiff must allege, in his declaration, the citizenship of the defendants, as well as of himself. Not being a citizen of Michigan, he could not declare against a citizen of Ohio:

Such an error would be fatal on demurrer. The form of pleading must be adapted to the requisitions of the statute. Should Collins in this case voluntarily appear and claim under the statute to be made a defendant, the court would give leave to the plaintiff to amend his declaration to meet the case. But unless this contingency shall occur, no reason is perceived for changing the form of the declaration. The excuse for not making Collins a defendant is sufficiently alleged. The demurrer is overruled.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—DECEMBER TERM, 1842.

BEFORE THE HONORABLE NATHANIEL POPE.

The following case was decided by Judge Pope, the district judge. Judge McLean does not attend the winter term in Illinois.

EX PARTE JOSEPH SMITH, (THE MORMON PROPHET,) ON HABEAS
CORPUS.

J. Butterfield & B. S. Edwards, counsel for Smith.

J. Lamborn, attorney general, for the state of Illinois.

THIS case came before the court upon a return to a writ of *habeas corpus*, which was issued by this court on the 31st of December, 1842, upon a petition for a *habeas corpus* on the relation of Joseph Smith, setting forth that he was arrested and in custody of William F. Elkin, sheriff of Sangamon county, upon a warrant issued by the governor of the state of Illinois, upon a requisition of the governor of the state of Missouri, demanding him to be delivered up to the governor of Missouri, as a fugitive from justice; that his arrest, as aforesaid, was under color of a law of the

Ex parte Joseph Smith (the Mormon Prophet) on Habeas Corpus.

United States, and was without the authority of law in this, that he was not a fugitive from justice, nor had he fled from the state of Missouri.

Afterwards, on the same day, the sheriff of Sangamon county returned upon the said *habeas corpus*, that he detained the said Joseph Smith in custody, by virtue of a warrant issued by the governor of the state of Illinois, upon the requisition of the governor of the state of Missouri, made on the affidavit of Lilburn W. Boggs. Copies of the said affidavit, requisition and warrant were annexed to the said return in the words and figures following:

“ *State of Missouri,* }
 County of Jackson, } ss.

This day personally appeared before me, Samuel Weston, a justice of the peace within and for the county of Jackson, the subscriber, Lilburn W. Boggs, who, being duly sworn, doth depose and say, that on the night of the 6th day of May, 1842, while sitting in his dwelling in the town of Independence, in the county of Jackson, he was shot with intent to kill, and that his life was despaired of for several days; and that he believes, and has good reason to believe, from evidence and information now in his possession, that Joseph Smith, commonly called the Mormon Prophet, was accessory before the fact of the intended murder; and that the said Joseph Smith is a citizen or resident of the state of Illinois; and the said deponent hereby applies to the governor of the state of Missouri to make a demand on the governor of the state of Illinois, to deliver the said Joseph Smith, commonly called the Mormon Prophet, to some person authorised to receive and convey him to the state and county aforesaid, there to be dealt with according to law.

LILBURN W. BOGGS.

Sworn to and subscribed before me, this 20th day of
 July, 1842. SAMUEL WESTON, J. P.”

Ex parte Joseph Smith (the Mormon Prophet) on Habeas Corpus.

"The Governor of the State of Missouri,

To the Governor of the State of Illinois—GREETING.

Whereas, It appears by the annexed document, which is hereby certified to be authentic, that one Joseph Smith is a fugitive from justice, charged with being accessory before the fact to an assault with intent to kill, made by one O. P. Rockwell, on Lilburn W. Boggs, in this state, and it is represented to the executive department of this state, has fled to the state of Illinois:

Now, therefore, I, Thomas Reynolds, governor of the said state of Missouri, by virtue of the authority in me vested by the constitution and laws of the United States, do by these presents demand the surrender and delivery of the said Joseph Smith to Edward R. Ford, who is hereby appointed as the agent to receive the said Joseph Smith, on the part of this state.

In testimony," &c.

"The People of the State of Illinois,

To the Sheriff of Sangamon County—GREETING.

Whereas, It has been made known to me by the Executive authority of the state of Missouri, that one Joseph Smith stands charged by the affidavit of one Lilburn W. Boggs, made on the 20th day of July, 1842, at the county of Jackson, in the state of Missouri, before Samuel Weston, a justice of the peace, within and for the county of Jackson aforesaid, with being accessory before the fact to an assault with an intent to kill, made by one O. P. Rockwell, on Lilburn W. Boggs, on the night of the 6th day of May, 1842, at the county of Jackson, in said state of Missouri, and that the said Joseph Smith has fled from the justice of said state, and taken refuge in the state of Illinois:

Now, therefore, I, Thomas Ford, governor of the state of Illinois, pursuant to the constitution and laws of the United States, and of this state, do hereby command you to arrest

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and apprehend the said Joseph Smith, if he be found within the limits of the state aforesaid, and cause him to be safely kept and delivered to the custody of Edward R. Ford, who has been duly constituted the agent of the said state of Missouri, to receive said fugitive from the justice of said state, he paying all fees and charges for the arrest and apprehension of said Joseph Smith, and make due return to the executive department of this state, the manner in which this writ may be executed.

“In testimony whereof,” &c.

The case was set for hearing on the 4th day of January, 1843, on which day Josiah Lamborn, attorney general of the state of Illinois, appeared, and moved to dismiss the proceedings, and filed the following objection to the jurisdiction of the court, viz:

“1st. The arrest and detention of Smith was not under or by color of authority of the United States, or of any officers of the United States, but under and by color of authority of the state of Illinois, by the officers of Illinois.

“2d. When a fugitive from justice is arrested by authority of the governor of any state, upon the requisition of the governor of another state, the courts of justice neither state nor federal, have any authority or jurisdiction to inquire into any facts behind the writ.”

The counsel of the said Joseph Smith then offered to read in evidence affidavits of several persons, showing conclusively that the said Joseph Smith was at Nauvoo, in the county of Hancock and state of Illinois, on the whole of the 6th and 7th days of May, in the year 1842, and on the evenings of those days, more than three hundred miles distant from Jackson county, in the state of Missouri, where it is alleged that the said Boggs was shot, and that he had not been in the state of Missouri at any time between the 10th day of February and the 1st day of July, 1842, the said per-

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sons having been with him during the whole of that period. That on the 6th day of May aforesaid, he attended an officers' drill at Nauvoo aforesaid, in the presence of a large number of people, and on the 7th day of May aforesaid he reviewed the Nauvoo Legion in presence of many thousand people.

The reading of these affidavits was objected to by the attorney general of the state of Illinois, on the ground that it was not competent for Smith to impeach or contradict the return to the *habeas corpus*. It was contended by the counsel of the said Smith, 1st. That he had a right to prove that the return was untrue. 2d. That the said affidavits did not contradict the said return, as there was no averment under oath in said return that the said Smith was in Missouri at the time of the commission of the alleged crime, or had fled from the justice of that state. The court decided that the said affidavits should be read in evidence, subject to all objections; and they were read accordingly.

The cause was argued by J. Butterfield and B. S. Edwards, for Smith, and by Josiah Lamborn, attorney general of the state of Illinois, contra.

J. Butterfield, counsel for Smith, made the following points:—

1. This court has jurisdiction.

The requisition purports on its face to be made, and the warrant to be issued, under the Constitution and laws of the United States, regulating the surrender of fugitives from justice.—2d sec. 4th article Const. U. S.—1st sec. of the act of Congress of 12th Feb. 1793.

When a person's rights are invaded under a law of the United States, he has no remedy except in the courts of the United States—2d sec. 3d article Const. U. S. 12th Wend. 325. 16 Peters, 543.

The whole power in relation to the delivering up of fugi-

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tives from justice and labor, has been delegated to the United States, and Congress have regulated the manner and form in which it shall be exercised. The power is exclusive. The state Legislatures have no right to interfere, and if they do, their acts are void.—2d and 3d clause of 2d sec. 4th article Constitution United States—2d vol. laws United States, 331. 16 Peters 617–18, 623. 4th Wheaton's Rep. 122, 193. 12 Wend. 312.

All courts of the United States are authorised to issue writs of *habeas corpus* when the prisoner is confined under or by color of authority of the United States—Act of Congress of Sept. 24th, 1789, sec. 14, 2d Condensed 33. 3d Cranch, 447. 3d Peters, 193.

2. The return to the *habeas corpus* is not certain and sufficient to warrant the arrest and transportation of Smith.

In all cases on *habeas corpus* previous to indictment, the court will look into the depositions before the magistrate, and though the commitment be full and in form, yet if the testimony prove no crime, the court will discharge *ex parte*. Tayler 5th, Cowen 50.

The affidavit of Boggs does not show that Smith was charged with any crime committed by him in Missouri, nor that he was a fugitive from justice.

If the commitment be for a matter for which by law the prisoner is not liable to be punished, the court must discharge him. 3 Bac. 434.

The Executive of this state has no jurisdiction over the person of Smith to transport him to Missouri, unless he has fled from that state.

3. The prisoner has a right to prove facts not repugnant to the return, and even to go behind the return and contradict it, unless committed under a *judgment* of a court of competent jurisdiction. 3d Bacon, 435, 438. 3 Peters, 202. Gale's Rev. Laws of Ills. 323.

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The testimony introduced by Smith at the hearing, showing conclusively that he was not a fugitive from justice, is not repugnant to the return.

J. Lamborn, attorney general of the state of Illinois, in support of the points made by him, cited 2d Condensed Rep. 37; Gordon's Digest, 73; Gale's Statutes of Illinois, 318; Conkling, 85; 9th Wendell, 212.

And afterwards, on the 5th day of January, 1843, Judge Pope delivered the following

OPINION.

The importance of this case, and the consequences which may flow from an erroneous precedent, affecting the lives and liberties of our citizens, have impelled the court to bestow upon it the most anxious consideration. The able arguments of the counsel for the respective parties, have been of great assistance in the examination of the important question arising in this cause.

When the patriots and wise men who framed our constitution were in anxious deliberation to form a perfect union among the states of the confederacy, two great sources of discord presented themselves to their consideration; *the commerce between the states, and fugitives from justice and labor*. The border collisions in other countries had been seen to be a fruitful source of war and bloodshed, and most wisely did the Constitution confer upon the National Government, the regulation of those matters, because of its exemption from the excited passions awakened by conflicts between neighboring states, and its ability alone to adopt a uniform rule, and establish uniform laws among all the states in those cases.

This case presents the important question arising under the constitution and laws of the United States, whether a citizen of the state of Illinois can be transported from his

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own state to the state of Missouri, to be there tried for a crime, which, if he ever committed, was committed in the state of Illinois; whether he can be transported to Missouri, as a fugitive from justice, when he has never fled from that state.

Joseph Smith is before the court, on *habeas corpus*, directed to the sheriff of Sangamon county, state of Illinois. The return shows that he is in custody under a warrant from the executive of Illinois, professedly issued in pursuance of the Constitution and laws of the United States, and of the state of Illinois, ordering said Smith to be delivered to the agent of the executive of Missouri, who had demanded him as a fugitive from justice, under the 2d section, 4th article of the constitution of the United States, and the act of Congress passed to carry into effect that article. The article is in these words, viz: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state, from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." The act of Congress made to carry into effect this article, directs that the demand be made on the executive of the state where the offender is found, and prescribes the proof to support the demand, viz: indictment or affidavit.

The court deemed it respectful to inform the governor and attorney general of the state of Illinois, of the action upon the *habeas corpus*. On the day appointed for the hearing, the attorney general of the state of Illinois appeared, and denied the jurisdiction of the court to grant the *habeas corpus*.

1st. Because the warrant was not issued under color or by authority of the United States, but by the state of Illinois.

2d. Because no *habeas corpus* can issue in this case from either the federal or state courts, to inquire into facts

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behind the writ. In support of the first point, a law of Illinois was read, declaring that whenever the executive of any other state shall demand of the executive of this state, any person as a fugitive from justice, and shall have complied with the requisition of the act of Congress, in that case made and provided, it shall be the *duty* of the executive of this state to issue his warrant to apprehend the said fugitive, &c. It would seem that this act does not purport to confer any additional power upon the executive of this state, independent of the power conferred by the constitution and laws of the United States, but to make it the *duty* of the executive to obey and carry into effect the act of Congress. The warrant on its face purports to be issued in pursuance of the constitution and laws of the United States, as well as of the state of Illinois. To maintain the position that this warrant was not issued under color or by authority of the laws of the United States, it must be proved that the United States could not confer the power on the executive of Illinois. Because if Congress could and did confer it, no act of Illinois could take it away, for the reason that the constitution, and laws of the United States, passed in pursuance of it, and treaties, are the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. This is enough to dispose of that point. If the legislature of Illinois, as is probable, intended to make it the *duty* of the governor to exercise the power granted by Congress, and no more, the executive would be acting by authority of the United States. It may be that the legislature of Illinois, appreciating the importance of the proper execution of those laws, and doubting whether the governor could be punished for refusing to carry them into effect, deemed it prudent to impose it as a duty, the neglect of which would expose him to impeachment. If it intended more, the law

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is unconstitutional and void. 16 Peters, 617. *Prigg v. Pennsylvania*.

In supporting the second point, the attorney general seemed to urge that there was greater sanctity in a warrant issued by the governor, than by an inferior officer. The court cannot assent to this distinction. This is a government of laws, which prescribes a rule of action, as obligatory upon the governor as upon the most obscure officer. The character and purposes of the *habeas corpus* are greatly misunderstood by those who suppose that it does not review the acts of an executive functionary. All who are familiar with English history, must know that it was extorted from an arbitrary monarch, and that it was hailed as a second *magna charta*, and that it was to protect the subject from arbitrary imprisonment by the king and his minions, which brought into existence that great palladium of liberty in the latter part of the reign of Charles the Second. It was indeed a magnificent achievement over arbitrary power. Magna Charta established the principles of liberty; the *habeas corpus* protected them. It matters not how great or obscure the prisoner, how great or obscure the prison-keeper, this munificent writ, wielded by an independent judge, reaches all. It penetrates alike the royal towers and the local prisons, from the garret to the secret recesses of the dungeon. All doors fly open at its command, and the shackles fall from the limbs of prisoners of state as readily as from those committed by subordinate officers. The warrant of the king and his secretary of state could claim no more exemption from that searching inquiry, "The cause of his caption and detention," than a warrant granted by a justice of the peace. It is contended that the United States is a government of granted powers, and that no department of it can exercise powers not granted. This is true. But the grant is to be found in the 2d section of the 3d article of the Constitution of the United States:

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“The judicial power shall extend to all cases in law, or equity, arising under this constitution, the laws of the United States, and treaties made and which shall be made under their authority.”

The matter under consideration presents *a case* arising under the 2d section, 4th article of the Constitution of the United States, and the act of Congress of February 12th, 1793, to carry it into effect. The judiciary act of 1789 confers on this court (indeed on all the courts of the United States,) power to issue the writ of *habeas corpus*, when a person is confined “under color of or by the authority of the United States.” Smith is in custody under color of, and by authority of the 2d section, 4th article of the Constitution of the United States. As to the instrument employed or authorised to carry into effect that article of the Constitution (as he derives from it the authority to issue the warrant,) he must be regarded as acting by the authority of the United States. The power is not official in the governor, but personal. It might have been granted to any one else by name, but considerations of convenience and policy recommended the selection of the executive, who never dies. The citizens of the states are citizens of the United States; hence the United States are as much bound to afford them protection in their sphere, as the states are in theirs.

This court has jurisdiction. Whether the state courts have jurisdiction or not, this court is not called upon to decide.

The return of the sheriff shows that he has arrested and now holds in custody Joseph Smith, in virtue of a warrant issued by the governor of Illinois, under the 2d section of the 4th article of the Constitution of the United States, relative to fugitives from justice, and the act of Congress passed to carry it into effect. The article of the constitution does not designate the person upon whom the demand

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for the fugitive shall be made; nor does it prescribe the proof upon which he shall act. But Congress has done so. The proof is "an indictment or affidavit," to be certified by the governor demanding. The return brings before the court the warrant, the demand and the affidavit. The material part of the latter is in these words, viz:—"Lilburn W. Boggs, who being duly sworn, doth depose and say, that on the night of the 6th day of May, 1842, while sitting in his dwelling in the town of Independence, in the county of Jackson, he was shot with intent to kill; and that his life was despaired of for several days, and that he believes, and has good reason to believe, from evidence and information now in his possession, that Joseph Smith, commonly called the Mormon prophet, was accessory before the fact of the intended murder, and that the said Joseph Smith is a citizen or a resident of the state of Illinois."

This affidavit is certified by the governor of Missouri to be authentic. The affidavit being thus verified, furnished the only evidence upon which the governor of Illinois could act. Smith presented affidavits proving that he was not in Missouri at the date of the shooting of Boggs. This testimony was objected to by the attorney general of Illinois, on the ground that the court could not look behind the return. The court deems it unnecessary to decide that point, inasmuch as it thinks Smith entitled to his discharge for defect in the affidavit. To authorise the arrest in this case, the affidavit should have stated distinctly, 1st. That Smith had committed a crime. 2d. That he committed it in Missouri.

It must appear that he fled from Missouri, to authorise the governor of Missouri to demand him, as none other than the governor of the state from which he *fled*, can make the demand. He could not have fled from justice, unless he committed a crime, which does not appear. It must appear that the crime was committed in Missouri, to warrant

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the governor of Illinois in ordering him to be sent to Missouri for trial. The 2d section, 4th article, declares, he "shall be removed to the state having jurisdiction of the crime."

As it is not charged that the crime was committed by Smith in Missouri, the governor of Illinois could not cause him to be removed to that state, unless it can be maintained that the state of Missouri can entertain jurisdiction of crimes committed in other states. The affirmative of this proposition was taken in the argument with a zeal indicating sincerity. But no adjudged case or dictum was adduced in support of it. The court conceives that none can be. Let it be tested by principle.

Man in a state of nature is a sovereign, with all the prerogatives of king, lords and commons. He may declare war and make peace, and, as nations often do who "feel power and forget right," may oppress, rob and subjugate his weaker and unoffending neighbors. He unites in his person the legislative, judicial and executive power—"can do no wrong," because there is none to hold him to account. But when he unites himself with a community, he lays down all the prerogatives of sovereign, (except self-defence,) and becomes a subject. He owes obedience to its laws and the judgments of its tribunals, which he is supposed to have participated in establishing, either directly or indirectly. He surrenders, also, the right of self-redress. In consideration of all which, he is entitled to the ægis of that community to defend him from wrongs. He takes upon himself no allegiance to any other community, so owes it no obedience, and therefore cannot disobey it. None other than his own sovereign can prescribe a rule of action to him. Each sovereign regulates the conduct of its subjects, and they may be punished upon the assumption that they know the rule and have consented to be governed by it. It would be a gross violation of the social compact,

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if the state were to deliver up one of its citizens to be tried and punished by a foreign state, to which he owes no allegiance, and whose laws were never binding on him. No state can or will do it.

In the absence of the constitutional provision, the state of Missouri would stand on this subject in the same relation to the state of Illinois, that Spain does to England. In this particular, the states are independent of each other. A criminal, fugitive from the one state to the other, could not be claimed as of right to be given up. It is most true, as mentioned by writers on the laws of nations, that every state is responsible to its neighbors for the conduct of its citizens, so far as their conduct violates the principles of good neighborhood. So it is among private individuals.—But for this, the inviolability of territory, or private dwelling, could not be maintained. This obligation creates the right, and makes it the duty of the state to impose such restraints upon the citizen, as the occasion demands. It was in the performance of this duty, that the United States passed laws to restrain citizens of the United States from setting on foot and fitting out military expeditions against their neighbors. While the violators of this law kept themselves within the United States, their conduct was cognizable in the courts of the United States, and not of the offended state, even if the means provided had assisted in the invasion of the foreign state. A demand by the injured state upon the United States for the offenders, whose operations were in their own country, would be answered, that the United States' laws alone could act upon them, and that, as a good neighbor, it would punish them.

It is the duty of the state of Illinois to make it criminal in one of its citizens to aid, abet, counsel, or advise, any person to commit a crime in her sister state. Any one violating the law would be amenable to the laws of Illinois, executed by its own tribunals. Those of Missouri could

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have no agency in his conviction and punishment. But if he shall go into Missouri, he owes obedience to her laws, and is liable before her courts, to be tried and punished for any crime he may commit there; and a plea that he was a citizen of another state, would not avail him. If he escape, he may be surrendered to Missouri for trial. But when the offence is perpetrated in Illinois, the only right of Missouri is, to insist that Illinois compel her citizens to forbear to annoy her. This she has a right to expect. For the neglect of it, nations go to war and violate territory.

The court must hold that where a necessary fact is not stated in the affidavit, it does not exist. It is not averred that Smith was accessory before the fact, in the state of Missouri, nor that he committed a crime in Missouri: therefore, he did not commit the crime in Missouri—did not flee from Missouri to avoid punishment.

Again, the affidavit charges the shooting on the 6th of May, in the county of Jackson, and state of Missouri, "that he believes and has good reason to believe, from evidence and information now (then) in his possession, that Joseph Smith was accessory before the fact, and is a resident or citizen of Illinois."

There are several objections to this. Mr. Boggs having the "evidence and information in his possession," should have incorporated it in the affidavit, to enable the court to judge of their sufficiency to support his "belief." Again, he swears to a legal conclusion, when he says that Smith was *accessary before the fact*. What acts constitute a man an accessory is a question of law, and not always of easy solution. Mr. Boggs' opinion, then, is not authority. He should have given the facts. He should have shown that they were committed in Missouri, to enable the court to test them by the laws of Missouri, to see if they amounted to a crime. Again, the affidavit is fatally defective in this, that Boggs swears to his *belief*.

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The language in the constitution is, "charged with felony, or other crime." Is the constitution satisfied with a *charge* upon suspicion? It is to be regretted that no American adjudged case has been cited to guide the court in expounding this article. Language is ever interpreted by the subject matter. If the object were to arrest a man near home, and there were fears of escape if the movement to detain him for examination were known, the word *charged* might warrant the issuing of a *capias* on *suspicion*. Rudyard, (reported in Skin.) 676, was committed to Newgate for refusing to give bail for his good behavior, and was brought before the common pleas on *habeas corpus*. The return was, that he had been complained of for exciting the subjects to disobedience of the laws against *sedition* *conventicles*, and upon examination they found *cause* to suspect him. Vaughan, chief justice, "*Tyrrel and Archer v. Wild*", held the return insufficient—1st. because it did not appear but that he might abet frequenters of conventicles in the way the law allows; 2d. to say that he was complained of, or was examined, is no proof of his guilt; and then to say that he had cause to suspect him, is too cautious; for who can tell what they count a cause of *suspicion*, and how can that ever be tried? At this rate they would have arbitrary power, upon their own allegation, to commit whom they pleased."

From this case, it appears that *suspicion* does not warrant a commitment, and that all legal intendments are to avail the prisoner. That the return is to be most strictly construed in favor of liberty. If suspicion in the foregoing case did not warrant a commitment in London by its officers, of a citizen of London, might not the objection be urged with greater force against a commitment of a citizen of our state, to be transported to another, on *suspicion*? No case can arise demanding a more searching scrutiny into the evidence, than in cases arising under this part of

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the constitution of the United States. It is proposed to deprive a freeman of his liberty—to deliver him into the custody of strangers, to be transported to a foreign state, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him—separated from his friends, his family and his witnesses, unknown and unknowing. Had he an immaculate character, it would not avail him with strangers. Such a spectacle is appalling enough to challenge the strictest analysis.

The framers of the constitution were not insensible of the importance of courts possessing the confidence of the parties. They therefore provided that citizens of the different states might resort to the federal courts in civil causes. How much more important that the criminal have confidence in his judge and jury? Therefore, before the *capias* is issued, the officers should see that the case is made out to warrant it.

Again, Boggs was shot on the 6th of May. The affidavit was made on the 20th of July following. Here was time for inquiry, which would confirm into certainty or dissipate his suspicions. He had time to collect facts to be laid before a grand jury, or be incorporated in his affidavit. The court is bound to assume that this would have been the course of Mr. Boggs, but that his suspicions were light and unsatisfactory.

The affidavit is insufficient—1st. because it is not positive; 2d. because it charges no crime; 3d. it charges no crime committed in the state of Missouri. Therefore, he did not flee from the justice of the state of Missouri, nor has he taken refuge in the state of Illinois.

The proceedings in this affair, from the affidavit to the arrest, afford a lesson to governors and judges, whose action may hereafter be invoked in cases of this character.

The affidavit simply says that the affiant was shot with intent to kill, and he believes that Smith was accessory

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before the fact to the intended murder, and is a citizen or resident of the state of Illinois. It is not said who shot him, or that the person was unknown.

The governor of Missouri, in his demand, calls Smith a fugitive from justice, charged with being accessory before the fact to an assault with intent to kill, made by one O. P. Rockwell, on Lilburn W. Boggs, in this state (Missouri). This governor expressly refers to the affidavit as his authority for that statement. Boggs, in his affidavit, does not call Smith a *fugitive from justice*, nor does he state a fact from which the governor had a right to infer it. Neither does the name of O. P. Rockwell appear in the affidavit, nor does Boggs say Smith *fled*. Yet the governor says he *fled* to the state of Illinois. But Boggs only says he is a *citizen or resident* of the state of Illinois.

The governor of Illinois, responding to the demand of the executive of Missouri for the arrest of Smith, issues his warrant for the arrest of Smith, reciting that—"whereas, Joseph Smith stands charged, by the affidavit of Lilburn W. Boggs, with being accessory before the fact to an assault with intent to kill, made by one O. P. Rockwell, on Lilburn W. Boggs, on the night of the 6th day of May, 1842, at the county of Jackson, in the said state of Missouri, and that the said Joseph Smith has fled from the justice of said state, and taken refuge in the state of Illinois."

Those facts do not appear by the affidavit of Boggs. On the contrary, it does not assert that Smith was accessory to O. P. Rockwell, nor that he had *fled from the justice of the state of Missouri*, and taken refuge in the state of Illinois.

The court can alone regard the *facts* set forth in the affidavit of Boggs, as having any legal existence. The mis-recitals and over-statements in the requisition and warrant, are not supported by oath, and cannot be received as evidence to deprive a citizen of his liberty, and transport

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him to a foreign state for trial. For these reasons, Smith must be discharged.

At the request of J. Butterfield, counsel for Smith, it is proper to state, in justice to the present executive of the state of Illinois, Governor Ford, that it was admitted on the argument, that the warrant which originally issued upon the said requisition, was issued by his predecessor; that when Smith came to Springfield to surrender himself up upon that warrant, it was in the hands of the person to whom it had been issued at Quincy in this state; and that the present warrant, which is a copy of the former one, was issued at the request of Smith, to enable him to test its legality by writ of *habeas corpus*.

Let an order be entered that Smith be discharged from his arrest.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—DECEMBER TERM, 1842.

DOE EX DEM. STURGESS v. THE BANK OF CLEVELAND.

A judgment has relation to the first day of the term, and from that time constitutes a lien on the lands of the defendant, which lie within the jurisdiction of the court.

A mortgage, under the act of 1831, takes effect only from the time it is left for record.

The statute makes the recording of the mortgage a part of its execution.

The mortgage first recorded, will create a paramount lien to one of prior date, which has not been recorded.

The peculiar provisions of the statute, would seem to preclude an equitable mortgage, which had not been first recorded.

Messrs. *Swayne* and *Payne*, appeared for the lessor of the plaintiff; and Mr. *Andrews* for the defendant.

OPINION OF THE COURT.

THE fee to the land in controversy being vested in one Vantine, he mortgaged it to the defendants on the 8th of June, 1839. The mortgage was left for record the 2d of July following. Vantine still continued to occupy the premises, after the mortgage, under a lease from the defendants.

At July term, 1839, Sturgess obtained a judgment in this

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court against Vantine for \$3,820. The court commenced on the first day of the month. An execution was issued on the judgment, which being levied on the premises in dispute, was sold to Sturgess, who holds the marshal's deed.

At the time the judgment was entered, there was no notice of the mortgage, but plaintiff's counsel had notice of it before the levy and sale.

On this statement of facts, the question arises, which of the parties have the prior lien. The 8th section of the act relating to the recording of deeds, of the first of June, 1831, provides, "that all mortgages executed agreeably to the provisions of this act, shall be recorded, &c. and shall take effect from the time when the same are recorded. And if two or more mortgages are presented for record on the same day, they shall take effect from the order of presentation for record; the first presented shall be the first recorded, and the first recorded shall have preference."

This statute introduces a new principle as to mortgages. Prior to it, the recording of a mortgage operated only as a notice to subsequent purchasers, but under the statute the mortgage takes effect only from the time it is recorded. Before this, the instrument has no validity as a mortgage. This is controverted by the defendant's counsel, who insists that such an instrument may take effect, as an equitable mortgage, before it is recorded. That even where a mortgage is defectively executed, still it may create an equitable lien against a subsequent purchaser with notice. And that an unrecorded mortgage, under the above statute, must at least be considered of equal validity to one defectively executed.

The case of the *Bank of Muskingum v. Carpenter*, (7 Ohio Rep. 21) which was in chancery, arose on a mortgage, dated in 1816, which had but one witness, the statute requiring two; but being prior to the judgment, under which a lien was asserted, was held to create a prior and

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equitable lien. The act of 1831 could have had no effect upon that instrument.

In *Magee v. Beatty*, (8 Ohio, 396) which was also in chancery, the question was raised whether a mortgage of a date prior to the judgment, though not recorded, created a paramount lien. The mortgage was left for record with the recorder before the judgment, and the judges divided on the point whether that, under the act of 1831 created a lien. In 1838 an act was passed declaring that the lien commenced, under the act of 1831, from the time the deed was left for record. This, in the opinion of the two judges who gave a different construction to that act, removed the difficulty. If the declaratory act gave a different construction to the act of 1831, from that which its words required; and created a lien under that act which did not before exist, it is very clear that effect could only be given to the declaratory act from its passage. But there would seem to be little doubt that the true construction of the act of 1831, created a lien from the time the deed was left for record. In doing this the mortgagee did all he could do, and all the law required of him, to constitute notice.

In this case the judgment, having relation to the first day of the term, created a prior legal lien to the mortgage, which was left for record the day after, and the question is whether the mortgage having been signed some days prior created an equitable lien. At the time the judgment was entered the plaintiff had no notice of the mortgage, but he had notice before the levy and sale.

The act of 1831 declares that the mortgage "shall take effect from the time it shall be recorded." It cannot, therefore, as a mortgage, take effect before it is recorded. And if the effect depends upon the recording of the instrument, the recording of it is a part of its execution. That the legislature have the power to prescribe the form of a deed, and say when it shall take effect, is undoubted.

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This view excludes the notion that an unrecorded mortgage may create an equitable lien, under the above act. The act declares that the mortgage "first presented shall be first recorded, and the one first recorded shall have preference." Now suppose the junior mortgage shall be first presented and recorded, shall it not have the preference? The statute so provides, and this excludes any equitable lien under the mortgage prior in date, but not recorded. There would seem to be no fallacy in this construction of the act.

The case of *Lake v. Doud et al*, (10 Ohio, 415) it is insisted is in opposition to this construction. It is true the court in that case say, "this although not a legal, is an equitable mortgage, and may be enforced in equity ; and will be preferred when of prior date to a subsequent judgment." And the court refer to the above cited case of the *Bank of Muskingum v. Carpenter* as sustaining the position stated. Now on general principles this view is correct, but it is not sustainable under the act of 1831. . And the court seem not to have adverted to the peculiar provisions of that act. But the case did not turn on that point. The deed which was set up against the mortgage the court say, "could not have been executed in good faith, and that it was fraudulent and void as to creditors and subsequent purchasers."

There is no difference between a general and special lien, which can affect this question. Equity, in a proper case, would direct a prior general lien to be first asserted against any property not included in the special lien, in order that both liens might be satisfied. A general lien is a charge on all the real estate of the party, and a special lien only on the part specified. Each lien is equally good from its date, and no other preference except that which rises from priority can be given.

In the case under consideration, the judgment having been entered one day before the mortgage was left for record, has the prior and paramount lien.

Judgment for the lessor of the plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—MAY TERM, 1843.

KIRKENDALL v. MITCHELL.

In a deed of general warranty it is not necessary to use the word "warrant," if other words of equal import shall be used.

Under a covenant to convey a certain tract by "a good general warranty deed, with the fee simple annexed," a covenant of seisen is not essential.

Usage, as to the forms of deeds, cannot be disregarded.

Mr. ——— appeared for the plaintiff.

Mr. *Bright* for the defendant.

OPINION OF THE COURT.

THIS action is brought on a bond in the penalty of ten thousand dollars, with a condition that on the payment of twenty-five hundred dollars, in certain instalments by the defendant, the plaintiff should make "a good and general warranty deed with the fee simple annexed" for a certain tract of land, containing one hundred and sixty acres.

The defendant prayed oyer of the bond, and says, that the plaintiff has not nor did at any time before the commencement of this suit or since, convey to said defendant or tender or offer to convey to him by good and general warranty deed, &c. The plaintiff replied that he was the true

absolute and legal owner of the land when it was sold, clear of all incumbrances in fee simple, was in possession, &c. That defendant was put into possession at the time of the contract, and continues to occupy the same for his own benefit, &c., free from all incumbrances; that before the commencement of the suit, to wit, the 1st April, 1841, plaintiff executed and acknowledged a good legal and sufficient deed of conveyance of general warranty in fee simple, clear of all incumbrances, to said defendant, and tendered it to the defendant, before the suit was commenced, &c.

To this replication the defendant demurred.

Two objections are taken to the deed tendered.

1. As to the warranty.

2. That it contains no covenant of seisen.

The plaintiff was bound to make to the defendant "a good and general warranty deed, with the fee simple annexed," &c. It is objected that the usual word "warrant" is not used in the deed. The grantor covenants to defend the title against the claim of all and every person, to the grantee, his heirs and assigns forever. Now although the covenant would have been more formal had the word "warrant" been introduced; yet the covenant is binding without it, the same as if the word had been used. The omission is no doubt chargeable to a clerical error. There is no covenant of seisen, and it is contended that this was essential to comply with the bond. That this is one of the covenants usually contained in a deed of fee simple.

This covenant is nothing more than that the grantor is seised of the premises, and if he was not seised he is liable to an action on this covenant, at any time, without an eviction of the grantee. But under a general warranty he is not liable, until the grantee shall be evicted by a paramount title. If the grantor was seised in fact, though under a disseiser, it is sufficient. *Pearce v. Jackson*, 4 Mass. Rep. 408.

Chancellor Kent, in his 4 Comm. 471, says "the usual personal covenants inserted in a conveyance of the fee, are 1. That the grantor is lawfully seised; 2. That he has good right to convey; 3. That the land is free from incumbrances; 4. That the grantee shall quietly enjoy; 5. That the grantor will warrant and defend the title against all lawful claims."

The deed under consideration contains a covenant against incumbrances, and a general warranty of the title. It is not objected, however, that there is no covenant for quiet enjoyment, nor that the grantor has right to convey, but only that there is no covenant of seisen. This is a personal covenant and the weight of authority is, that it does not run with the land.

Under the covenant against incumbrances, the grantee, before any action, may pay off the incumbrance, and bring his action against the grantor. *Prescott v. Truman*, 4 Mass. 627.

This question may, in some degree, be influenced by general usage. In this country deeds are far less formal, even where the fee is conveyed, than is thought necessary in England. And no one can fail to observe the useless verbiage contained in ancient deeds. Certain technical words, or their import, are essential to a conveyance in fee simple; and beyond these the fewer words used to describe the premises with certainty, and the intention of the parties, the better.

The five requisites above stated, it is believed, are rarely contained in a deed of conveyance in this country; and we think they are not, all of them, and especially the covenant of seisen, necessary to constitute a good and general warranty deed, with the fee simple annexed, in the language of the contract in this case. The demurrer is overruled, and judgment.

PATTERSON v. ATHERTON.

A plea that the defendant paid the note to the assignor, before he had notice of the assignment, cannot be sustained against the assignee.

The plea should aver that the payment was made before the note was assigned, or before it was due.

And so where the defendant alleges he paid five hundred dollars to the assignor, before he had notice of the assignment. And the averment, that the balance was paid to the plaintiff is defective, as it does not appear that the plaintiff received it as such, in discharge of the note.

OPINION OF THE COURT.

This action is brought on a promissory note, given to Buckminster & Barally, at Philadelphia, for \$1073, on the 4th of March, 1836, payable in six months. The declaration alleges the note to have been assigned to the plaintiff before it became due.

The defendant pleaded, that after the execution of the note, and before he had notice of the assignment, and before the commencement of the suit, the defendant paid to the assignor the amount of the note.

He also pleaded that before he had notice of the assignment, he paid to the assignor five hundred dollars, and after the assignment, and before the commencement of the suit, he paid the residue to the plaintiff.

To these pleas the plaintiff demurred.

The demurrer must be sustained to both pleas. In the first place, it does not appear that the payment was made to the assignor, before the note was due, or before it was assigned; and the second plea is defective, because it does not appear that the sum of five hundred dollars, alleged to have been paid to the assignor, before notice of the assignment, was in fact made before the assignment, or before the

note was payable; and it does not appear that the balance due was accepted by the plaintiff, as such, in discharge of the note.

There are other issues which require a jury.

MASON v. WALLACE.

Where possession has been taken of property purchased, and valuable improvements made, the acquiescence of the vendor may be presumed.

A delay of payment for two years, under such circumstances, where the vendor sustains no damage which interest will not compensate, will not bar a bill for a specific execution of the contract.

Where time is made an essential part of the contract, the rule is different.

Mr. *Stevens*, for the plaintiff.

Mr. *O. H. Smith*, for the defendant.

OPINION OF THE COURT.

THIS is a bill for the specific execution of a contract.

On the 1st of January, 1835, Mason purchased from the defendant, Wallace, lots 112 and 113, in Jeffersonville, in this state, for six hundred dollars, payable in three annual payments, of two hundred dollars each. Wallace executed a title bond for a deed when the purchase money should be paid. Shortly after the purchase, Mason took possession, and has remained in possession. He has made large and valuable improvements upon the lots, and in the streets, &c., amounting to a sum exceeding 4,000 dollars. On the 1st of September, 1838, Mason tendered to Wallace 732 dollars, the amount due, including interest, on the contract of purchase, which Wallace refused, and declined making

a deed. This refusal was founded on the negligence of Mason, in not paying the purchase money; and a specific execution of the contract is resisted on the same ground.

Time may be made a material part of the contract, and, when that is done, chancery will not decree a specific execution in favor of a party who has failed to perform his part of the agreement. But in most cases time is not essential, and a mere delay of payment, unless it has been unreasonable, will be no bar to a specific execution of the contract. Where the default is connected with a material change in the circumstances of the parties, or in the value of the property, chancery will not decree a performance.

In the present case, the purchaser has not only been in possession of the premises since the purchase, but he has expended, in improving the property, more than seven times the amount of the purchase money. The defendant alleges that this was done by complainant in his own wrong, and without authority. But, from the possession of the complainant, and the progress of his improvements, the defendant must have had full notice, and, as it does not appear that he took any step to arrest the progress of the complainant, the acquiescence of the defendant may be fairly presumed.

The delay was less than two years of the first payment, and less than one of the second. The doctrine which governs this case is found in *Longworth v. Taylor*, 1 McLean, 400; same case, 14 Peters, 174; and in 2 McLean, 197.

We think, taking all the facts and circumstances into consideration, the plaintiff is entitled to the relief prayed for in his bill, on his paying the purchase money, and interest up to this decree. There was an informality in the tender, and this, connected with the general features of the case, induces the court to require the payment of the interest, as stated.

Decree, &c.

HOME v. SEMPLE, ET AL. .

An action of debt will lie where the sum is certain, and it is the duty of the defendant to pay the amount to plaintiff.

The action may be brought by the assignee against the acceptor of a bill; and consequently by the payee against the acceptor.

An indorser may bring debt against the drawer, although there may be intermediate indorsements, by striking out those indorsements.

Messrs. *Wright & Patterson* appeared for the plaintiff, and *H. B. L. Engram*, for the defendants.

OPINION OF THE COURT.

This is an action of debt brought by the indorsee against the drawer of a bill, there being several intermediate assignments. A general demurrer was filed. It is laid down in *Hardress*, 435, that debt does not lie by a payee against the acceptor of a bill for want of privity. But debt will lie wherever the common law raises a duty, and the acceptor is bound legally and morally to the payee. He accepts and thereby promises to pay to the payee of the bill the sum named. There is then a privity between them, on which, according to the doctrine in *Hardress*, an action of debt may be sustained. In *Bishop v. Young*, 2 Bos. & Pul. 78, it was held that debt would lie by the payee of a note against the maker, where the note was expressed to be for value received. In that case the doctrine laid down by *Hardress* was considered. And in *Raborg v. Peyton*, 2 Wheat. 385, the court say, "in general, the legal predicament of the maker of a note is like that of the acceptor of a bill. Each is liable to the payee for the payment of the note or bill in the first instance; and after indorsement, each incurs the same liabilities.

The State of Indiana v. Jane Miller et al.

And if an action of debt will lie in favor of the payee of the note against the maker, it is not easy to perceive any sound principle, upon which it ought to be denied against an acceptor of a bill. The acceptance of a bill is just as much an admission of a debt between the immediate parties, as a drawing of a note." It has been held that debt will lie in favor of a payee against the drawer, in case of non-payment by the acceptor. *Hard's case*, Salk. 23. *Hodges v. Stewart*, Skinn. 346, 10 Wend. 341.

Upon the whole, we think the action of debt in this case is sustainable, the plaintiff striking out the intermediate indorsements, and that the demurrer must be overruled. Judgment.

THE STATE OF INDIANA v. JANE MILLEN, ET AL.

Under the act of 19th April, 1816, lands reserved for salt springs, within the limits of Indiana, were vested in the state.

And these were certified by the commissioner of the land office, to be all the lands, within the state, reserved for that purpose.

The act of 1816 limited the grant to thirty-six entire sections.

In 1831 a patent was issued for certain land, claimed by the state, as coming within the grant of the act of 1816, as containing a salt spring.

This reserve, not having been so entered on the records at Washington, or at the land office in Cincinnati, and not coming within the thirty-six sections conveyed to the state, was held not to be vested in the state, but in the patentee.

A salt lick or spring, in the acts of Congress, seem to have been referred to as words of substantially the same meaning.

Mr. *Stevens* appeared for the plaintiff, and Mr. *Lane* for the defendant.

OPINION OF THE COURT.

This action is brought by the state of Indiana, to recover possession of a certain tract of land, which is claimed under certain acts of Congress. The action having been brought

in the state court, has, by consent, been transferred to this court. The defendants hold the land under a patent, dated in 1831. They claimed the land under a pre-emption right, by virtue of the act of the 29th May, 1830. The facts of the case being agreed, the questions of law are submitted to the court.

As the legal title is vested in the defendants, the plaintiff can only recover by showing that it holds a prior grant, or that the patent has been fraudulently obtained by defendants, or that it has been issued without the authority of law. The plaintiff contends that the tract in controversy contained a salt spring, and was conveyed to the state as such, long before the patent was issued to the defendants.

In the 2d section of the act of the 18th May, 1796, it is provided, that "every surveyor shall note in his field book, the true situations of all mines, salt licks, salt springs, and mill seats, which shall come to his knowledge; all water courses over the line he runs shall pass, and also the quality of the lands." This field book was required to be copied and transmitted to the officers, who may superintend the sales of the land. By the 6th section of the act of the 26th of March, 1804, it is declared that, "the several salt springs in the said territory, together with as many contiguous sections to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States: and any grant which may hereafter be made for a tract of land, containing a salt spring, which had been discovered previous to the purchase of such tract from the United States, shall be considered as fraudulent and null." By the act of the 29th February, 1808, lands heretofore reserved were authorised to be sold, except section numbered sixteen, and the salt springs, and the lands reserved for the use of the same.

Congress, by reserving salt springs, could only have

intended to include those that were valuable, for the purpose of making salt. This is evident from the reservation of as many contiguous sections as the President should deem necessary. It seems that on the north-east quarter of section 25, the tract in controversy, the surveyor indorsed, "there is an extraordinary salt spring, said to be superior to any other in the territory." Symmes, the register, swears that this land was always reserved. Findlay states that it was reserved; that it was marked on the plat "U. S." The act of 24th February, 1815, authorises "Perine to enter at private sale the north-east quarter of the above section; if, on inquiry, the register and receiver shall be satisfied that it does not contain any salt spring or springs, valuable for the purpose of making salt."

By the act of the 19th of April, 1816, in the 6th section, it is provided, "that all salt springs within the said territory of Indiana, and the lands reserved for the use of the same, together with such other lands as may, by the President of the United States, be deemed necessary and proper for working the said salt springs, not exceeding in the whole, the quantity contained in thirty-six entire sections, shall be granted to the said state of Indiana for the use of the people of the said state, the same to be used under such terms, conditions and regulations, as the legislature of the said state shall direct: Provided, the said legislature shall never sell nor lease the same for a longer period than ten years at any one time." Under this legislative grant, the state claims the lands in controversy. But as this grant conveys, by a general description, the state must show that the land claimed by it, comes within the description.

It appears that the salt lick or spring in question, was found of no value for the manufacture of salt. After some few attempts to make salt, it was found that the water was not of sufficient strength to make it of any value for

this purpose. It was resorted to by animals, which drank the water, and this created an impression that it was a valuable salt spring. A distinction is made between a salt lick and a salt spring, by defendant's counsel, and it is insisted that the terms convey different meanings. That a lick is formed where salt water appears on the surface of the ground; but that a spring is a fountain of water. These terms seemed to be used in the acts of Congress, as synonymous. A salt lick is so called, in the western country, from the fact that deer and other wild animals resort to it, and lick or drink the brackish water. And in this respect no distinction is perceived between a lick, as frequently used, and a salt spring.

Although this salt lick or spring was noted by the surveyor, yet it was not entered as a reserve on the books of the general land office, or on the books of the register's office in Cincinnati. And it appears, that in 1826, the commissioner of the general land office instructed the register of the land office at Cincinnati, that the existing law authorised him to sell the land in question at the next public sale. And by the act of the 12th of February, 1831, the President of the United States was authorised to offer, at public sale, the three remaining quarters of section twenty-five, the other quarter section having been entered by Perine, under the act of 1815, as above stated.

On the 10th of August, 1836, E. A. Brown, commissioner of the general land office, certified a list of the lands selected under the sixth section of the act of the 19th of April, 1816, which, by that act, were granted to the state, as having been reserved from sale on account of salt springs. This list includes the quantity of thirty-six sections, which was the limitation of the grant, and among them the tract in controversy was not included.

Under a general law of the state of Indiana, in relation to lands on which salt springs were situated, a lease for

the premises in question was executed. But the lessee never entered into the possession. On the 3d of February, 1832, a joint resolution of the legislature of Indiana was passed, in which facts, in relation to the land in controversy, were stated through misapprehension, and the governor was requested to correspond on the subject with the commissioner of the general land office. The application of the legislature was rejected by Congress. But on the 3d of July, 1832, Congress authorised the state to sell the lands granted to it by the act of 1816. This was done in pursuance of a memorial of the Indiana legislature, dated the 23d of January, 1829, in which they represented that a township had been reserved for making salt, which had been conveyed to the state by the act of 1816, and that all attempts to make salt had proved abortive, and they prayed for an act to authorise the state to sell the lands, &c.

From the foregoing facts and acts of Congress, it clearly appears that the land in controversy never vested in the state. It was not entered as a reserve on the records at Washington, or at Cincinnati. The state received, under the act of 1816, thirty-six entire sections, which were all it was entitled to under that act; and the land now claimed was not included in the above. The commissioner of the general land office certified that the state had received all the lands within it, which had been reserved for salt springs. All of which land, it appears, under the act of Congress, the state has sold. We are, therefore, clearly of opinion, that the sale of the land to the patentee was authorised by law, and, consequently, that the patent is valid. No ground is perceived, on which the claim of the state can be sustained.

Judgment for the defendant.

UNITED STATES v. HUDSON & EDRIDGE.

The agent, whose duty it is to enforce legally the claims of the United States against delinquents, may, for the benefit of the government, exercise a reasonable discretion in the management and compromise of suits.

This necessarily results from the nature of the duties to be performed.

The executive, without authority of law, cannot go into the market and purchase and sell land.

But it may compromise doubtful claims, and in the best possible mode secure the interests of the government.

Lands so acquired by it, may be sold and conveyed.

Mr. Cushing, district attorney, appeared for the plaintiffs.
Messrs. Wright & Patterson, for defendants.

OPINION OF THE COURT.

THIS action is founded on a note given by the defendants to the plaintiffs, on a sale of certain lands conveyed to them in discharge of a debt due to them by Israel T. Canby.

The pleas set up the facts which constituted the original transaction between the government and the late receiver Canby, and that the land sold by the government was purchased by it from the said Canby, without authority of law, and consequently that the contract is not binding on the defendants, as no valid title has been tendered, or can be made, &c.

To this plea the plaintiffs filed a demurrer.

It may be admitted that the executive cannot purchase and dispose of land, without authority of law. Treaties are made with Indians, by which their right to the soil is extinguished, and the land, then, is authorised to be sold by act of Congress. Special and limited powers are conferred for the accomplishment of these objects. And as no such powers were conferred in the case under consideration,

it is contended that the whole proceeding in regard to the lands purchased by the defendants was void.

The agency of the solicitor in the collection of debts due to the government is limited only, by the exercise of a judicious discretion. Where he considers it to be to the interest of the United States, he may, in the progress of a suit, give reasonable indulgence. And where a demand is considered doubtful, from the inability of the debtor to make payment, the solicitor may take security for the money, and give time for the payment of it. Such a contract would be good at common law, and in no sense opposed to the policy of the law. On the contrary, it would be sanctioned by a sound policy. Such a power must necessarily exist in every superintending agency for the legal enforcement of the public claims. In the 8th vol. Laws United States, 345, are provisions which sustain this view.

The cases of *Leonard v. Bates*, 1 Blackf. 172, and *Cunningham v. Gwinn*, 4 Blackf. 341, are relied on to show that a defect of title or an inability to make a good title, may be set up in an action for the consideration; and that when the deed is to be made, on the payment of the money, it should be tendered or at least be ready for delivery.

The land having been purchased by Canby, from the government, with the public funds, which caused his defalcation, he relinquished the same to the government as an act of justice, which was accepted by way of compromise; and the land was sold to the defendants through a special agency, and the note given on which this action is brought. We see no defect of power in the officers of the government to make this arrangement. A similar power has more or less been exercised since the foundation of the government.

In the nature of things, the title of the defendant, which the government will make, will be indisputable. No ad-

McClintick v. Cummins.

verse claim can in any way arise, by which the validity of the title can be questioned. The demurrer to the special plea is sustained. Judgment.

McCLINTICK v. CUMMINS.

Duress cannot be pleaded by a stranger.

Negotiable notes being executed in Indiana, payable at the Bank of Madison, in that state, if assigned in Pennsylvania, to an unauthorised banking association, the assignee cannot sustain an action in Indiana.

The *lex loci*, governs the contract of assignment, and also the original contract.

And as an assignment to an unauthorised banking association is void in Pennsylvania, it gives no right to the assignee in that or any other state.

This case was argued by Mr. *Stevens* for the plaintiff, and by Mr. *Bright* for the defendant.

OPINION OF THE COURT.

THIS suit is brought by the plaintiff as assignee of two promissory notes of seven hundred fifteen dollars and five cents each. The defendant pleaded, 1. Non assumpsit, and 2. Duress, &c.

The plea of duress is founded on the following facts. J. D. Johnston was indebted to Riley & Van Amrige, of Philadelphia, in the sum of three thousand dollars, for which two notes, signed by himself and Anderson & Shipley, of Ohio, were given.

Van Amrige made a charge on oath against Johnston, that he had committed larceny, by stealing a certain number of hogsheads of tobacco, which had been pledged to Riley & Van Amrige, and that the said Johnston was a fugitive from justice. The governor of Pennsylvania demanded Johnston from the governor of Indiana, under the

act of Congress, and duly authorised Van Amrige, as the agent of the state of Pennsylvania, to act in the premises. On the exhibition of his authority by Van Amrige to the governor of Indiana, he issued his warrant on which the sheriff of Jefferson arrested and imprisoned Johnston. While thus imprisoned, a contract was entered into between Van Amrige and Johnston, and Cummins, the defendant, under which the note sued on was given by Johnston, and Cummins as his security. After this arrangement Johnston was released from imprisonment and permitted to go at large. The excuse for not taking him back to Pennsylvania was, that no provision had been made by that state to pay the expenses.

On these facts it is contended, that the note was given under duress of imprisonment by Johnston the principal, and that if this be so, Cummins, signing as security, under the circumstances, may avail himself of the same plea.

In support of this ground, that the surety may take advantage of the duress of the principal, the following authorities were cited. 1 Bacon Ab. 13; 2 Bay 211; 2 Strange 916; 1 Conn. 356.

It is not necessary to decide this point, as, from the facts, it does not appear that the imprisonment of Johnston was unlawful, or that he was detained until he executed the notes. In Bacon's Ab. Duress, B. it is laid down that "the duress which will avoid a deed must be done to the party himself; therefore if A and B enter into an obligation, by reason of duress done to A, B shall not avoid this obligation, though A may, because he shall not avoid it by duress to a stranger." 1 Roll. Abr. 687, Mental and Woolington, Cro. Jac. 187. S. P. adjudged, and that the bond may stand good as to one, and be avoided as to the other. The father and son may each avoid his obligation by duress of the other; and so a husband may avoid his deed by duress of his wife.

As regards the defendant, he signed the notes deliberately, receiving at the same time an indemnity, by the assignment to him of certain notes, which exceeded the sum for which he became responsible. There is, therefore, no pretence that he acted under duress at the time he signed the notes in question.

The fact of the abandonment of the prosecution by Van Amrige, would seem to afford ground for a suspicion, that it was resorted to with the view of compelling Johnston to give security for the debt; but the evidence does not establish this fact. There was no agreement that on executing the notes Johnston should be released, or that the prosecution should be abandoned. A want of funds was the reason assigned why the prisoner was not taken to Pennsylvania. The proceedings under which the arrest was made, were regular, under the act of Congress.

The great question in the case is, as to the right of the plaintiff to sustain this action, as assignee of the notes. He is proved to be secretary of the "Saving Institution" of Philadelphia, which is not incorporated. The payees of the notes assigned them to Ellis, and he assigned them to the plaintiff. On one of the assignments, "P. City Saving Institution," is named, but McClintick is not designated as acting for that institution. It is proved that the notes were discounted by that institution. Were these assignments inhibited by the law of Pennsylvania; and if so, could a recovery have been had under them in that state? In the case of *Collins v. Smith*, decided in 1841, by the supreme court of Pennsylvania, the court held that, "the Schuylkill Savings Institution," an institution similar to the one above named, "was an unincorporated banking association." That the act of 1810, "forbade unincorporated banks to issue their notes; to lend money on business or accommodation paper; to receive it on deposit; or to do any other act which an incorporated bank may do." And

the court adjudged that a note given to the treasurer of such an institution was void. Under this decision a note discounted by such an institution, and assigned to its secretary or cashier, must also be void, under the laws of Pennsylvania. And here the question arises, whether the assignment in question is governed by the laws of Pennsylvania.

By the plaintiff's counsel it is earnestly contended, that the notes having been executed in Indiana and payable there, must be considered as Indiana contracts, and governed by the laws of that state. That the assignment of the notes in Pennsylvania was made in reference to the place of payment, and must be governed by the Indiana law.

That these contracts in their creation and performance were governed, and are to be decided by, the law of Indiana, is undoubted. But the assignments in Pennsylvania do not come under the same rule. Every assignment of a negotiable instrument is a new contract between the assignor and the assignee, and is governed by the law of the place, where it was made. All the properties given to the bills or notes by the laws of Indiana at the time they were executed, will attach to them, wherever they may be taken or negotiated. As, for instance, if the bills or notes were not negotiable by the laws of Indiana, they would be negotiable no where. The law of the place where the contract is made must determine its character, though suit be brought on it in another state, where the law is different.

This principle is illustrated in a case where a negotiable bill of exchange is drawn in Massachusetts, on England, and is indorsed in New York, and again by the first indorsee in Pennsylvania, and by the second in Maryland. The bill was dishonored. And the question arose, what amount of damages the respective indorsers were liable for. In Massachusetts, the damages were ten per cent.; in New York

and Pennsylvania, twenty per cent.; and in Maryland, fifteen. And the court held that each indorser was liable under the law of the place where the indorsement was made. This is in conformity with the rule above stated, that the *lex loci* governs the contract. "The drawer and indorsers do not contract to pay the money in the foreign place where the bill is drawn; but only to guaranty its acceptance and payment in that place by the drawee; and in default of such payment, they agree upon due notice to reimburse the holder, in principal and damages, at the place where they entered into the contract." *Potter v. Brown*, 5 East's Rep. 123, 130; *Hicks v. Brown*, 12 John. 142; *Powers v. Lynch*, 3 Mass. 77. Conflict of Laws, sec. 314, 315.

By the laws of France, a blank indorsement of a promissory note does not transfer the property of the note, and is treated as a mere procuration. An indorsement there must state its date, the consideration, and the name of the assignee. A note indorsed in blank in France, was sued on in England, and the court held, as the assignment did not pass the property in the note where it was made, it did not entitle the assignee to bring an action in England; although the assignment, if made in England, would have been good. *Trimbey v. Vignier*, 1 Bing. N. C. 151, 158.

Every assignment of a negotiable instrument, as between the parties to that assignment, is subject to the law of the place where the contract of assignment is made; and if by such law the assignment was void, as against law, the assignee can exercise no right under such a transfer, in the state where it was made, or in any other state or country. The contract of assignment is not, as the counsel supposes, an Indiana contract, nor that the assignor will perform a duty in Indiana; but that if the drawers of the notes there shall fail to pay them, on demand and notice, such being the law of Pennsylvania, he will pay the notes. Now this

is a very different contract from that made by the original parties to the notes; and as it was made in a different state, must be subject to the law of that state. And as it appears, by the decision of the supreme court of Pennsylvania, that the assignment to the plaintiff was void, he cannot sue by virtue of it in this court.

These questions having been submitted to the court, and a jury waived, the court think that the plaintiff must suffer a non suit. Non suit entered.

UNITED STATES v. CUMPTON AND COLEMAN.

A rejoinder must answer the replication.

It must tender an issue on a single point.

If double, it is demurrable.

The plea of *nil debit* is improper, where the action is founded on a deed.

If the deed be only inducement to the action, that plea is proper.

The district attorney appeared for the plaintiffs, and Mr. Bright for the defendants.

OPINION OF THE COURT.

CUMPTON, the defendant, having been post master, and failing to account, &c. the above action was brought on his official bond. He pleaded that he had in all things performed his duties faithfully, and accounted for monies received, &c. The plaintiffs replied that he did not at all times after the making of the said writing obligatory and the said condition thereof, well and truly observe, perform, fulfil or keep, all and singular the conditions, &c. in the said writing, as in said plea is alleged, but that he broke

the same. 1. That he did not make returns every three months. 2. Rendered no account since the 2d April, 1840; and that between the 1st April, and 30th of the same month, divers sums came to his hands as post master. 3. That on the 13th April, 1840, there was in his hands the sum of sixty-eight dollars.

To this the defendants rejoined, 1st. That the said Cump-ton did heretofore, and before the commencement of this suit, to wit, the 5th July, 1841, at said district, render accounts of his receipts and expenditures as post master, to the general post office, which were then and there received. 2d. That said Cumpton, as post master, did not, at divers times between the 1st April, 1840, and the 10th of the same month, receive divers sums amounting to sixty-eight dollars, and that he does not owe. 3. That he owes nothing, &c.

To this rejoinder the plaintiffs demurred.

The demurrer must be sustained. The rejoinder does not answer the breach, to which it was intended to apply. The breach assigned is, that the said Cumpton did not once in three months faithfully render accounts of his receipts, &c. as post master. The rejoinder is, that Cumpton, on the 5th July, 1841, rendered accounts, &c. which were received, &c. The law requires quarterly accounts to be rendered. Cumpton was post master from 6th November 1838, to 13th April, 1841. The rejoinder is, therefore, defective in this, that it does not show or aver that accounts were rendered once in three months. The post office law imposes a penalty on post masters, who neglect to make their quarterly returns. They are liable to pay double the amount of postages, ordinarily received, in each quarter, if the quarterly return be not made.

The second part of the rejoinder is double, and is, therefore, demurrable. It denies certain allegations of the replication, and also avers that Cumpton owes nothing. The

issue must be tendered on a single point, though it may include several facts. Here, however, two distinct issues are tendered. The third part of the rejoinder, which is *nil debit*, is also demurrable. This plea can never be pleaded when a specialty is the foundation of the action. It is proper in a case where the deed is mere inducement to the action. 1 Chitty Pl. 423. 1 Saund. Pl. and Ev. 406. The demurrer is sustained, and judgment.

SILVER v. HENDERSON, ET AL.

Where a note is made payable at a particular place, a demand at such place, when the note becomes due, is not necessary, to maintain an action against the maker.

An averment that the note was assigned on the day, or at the time of its execution, is sufficient.

Where an action is brought against two, as the survivors of one, who executed a joint note, it is not essential to allege in the breach, that the note had not been paid by the deceased.

Mr. Coombs appeared for the plaintiff, and Mr. Cooper, for the defendants.

OPINION OF THE COURT.

This action was brought on a promissory note, payable at the branch bank at Fort Wayne. The defendants demurred to the declaration, and assigned the following causes of demurrer:

1. That presentment and demand of payment of the note at the bank, when it became due, is not averred in the declaration.

2. That the suit is brought in the name of the assignee, and the declaration does not aver that the money had not

been paid to the assignors, nor that it had been assigned before due.

3. That the suit is against Stevens and Henderson, survivors of William A. Henderson, upon an alleged joint contract; and the breach is, that the money was not paid by the survivors to the assignee.

As to the first ground of demurrer, it is settled that, as against the maker of a note, payable at a particular place, no demand of payment is necessary. There was, at one time, much discussion in England on this point; and it was decided differently by the courts of king's bench and common pleas; the latter requiring a demand of payment at the place stipulated; and this construction was sustained by an appeal to the house of lords. But parliament interfered and established the contrary rule, as decided by the king's bench. In this country there has been a diversity of decisions on the point, but the supreme court, in *Covington v. Comstock*, 14 Peters, 44, held that a demand in such a case was unnecessary to sustain an action against the maker of the note. If the defendant was ready to pay, or in fact did pay into the bank the amount to be paid to the holder of the note, it is matter of defence. To sustain an action against an indorser, a demand, of course, must be made.

As to the second ground of demurrer, the declaration alleges the date of the note to be 8th December, 1836, payable in twelve months, and that it was then and there assigned; that is, on the day it was executed. This averment is sufficient.

The third cause of demurrer is not sustainable. William A. Henderson, who is dead, is not a party to this suit. If during his life he paid the note, it is matter of defence. Where a person declared upon a bill of exchange, drawn upon and accepted by three persons, and it was proved to have been drawn upon and accepted by three, jointly, with

a fourth, plaintiff recovered, and it was held to be no variance. *Mountstephen v. Brooke*, 1 Barn. & Al. 224. It is usual in the declaration on a joint demand, as for goods sold, &c., against the survivor of a partnership, to allege the joint undertaking, &c., the death of one of the partners, who did not, in his life time, pay, &c., but a count is good on promises by the surviving partner, or, where the amount is stated, without noticing the deceased. 2 Saunders, Pl. and Ev. 709. In 1 John. cases, 405, in an action of assumpsit for goods which were sold to two partners, against the survivor, it was held "to be unnecessary to notice the survivorship. In such case, the executor of the deceased partner, at law, is discharged from liability."

The demurrer is overruled. Judgment.

THOMAS'S ASSIGNEE v. W. W. & C. O. PAGE.

A note, though absolute on its face, may be made payable, on conditions, by a separate agreement, as between the original parties.

And in the hands of an assignee, with full knowledge of the conditions, they take effect, the same as between the original parties.

A plea which admits the execution of the instrument, and sets up matter in avoidance, is not objectionable as amounting to the general issue.

Mr. Cushing appeared for the plaintiff; and *Mr. Stevens*, for the defendants.

OPINION OF THE COURT.

THIS action is brought on a note for \$2316 33 from defendants to Stevens, the assignor of the plaintiff, payable in twelve months.

The defendants pleaded non assumpsit, and also a special

plea, alleging that at the time the above note was executed to Stevens, it was given in part consideration of two bills of exchange accepted by Lewis Evans, of Madison, Indiana, both dated 5th October, 1838, for \$2316 33 $\frac{1}{4}$ each, one payable twelve months after date; the other at twenty-four months after date, given to Samuel K. Page, and that it was fully understood that this due bill of W. W. & C. O. Page, for the two thousand three hundred sixteen dollars and thirty-three cents, payable to said Stevens, was not to be considered as an obligation binding on them to pay, if the bills of Lewis Evans were not paid at maturity, and S. K. Page was authorised to compound, if it should be requisite, with Evans, and any loss or expense was to be made and allowed by said Stevens; and that said due bill was not to be of any value, or any demand made on the defendants for it, until said acceptances of said Evans were all paid in cash, and the same produced with the due bill; and the defendants aver that before the assignment of said note to the plaintiff, he had full notice of this agreement; that the acceptor was insolvent, and that no part of the bills had been paid.

The plaintiff demurred to this plea, and assigned, as causes of demurrer—

1. That the defeasance set forth in said plea as a bar, is inconsistent and void.

2. If the defeasance be valid on its face, there is no sufficient averment in the plea that due diligence has been used to collect the bills of exchange.

3. That there is no averment of an offer to return the bills of exchange, and no averment that the defendants have them ready to deliver up to the plaintiff.

4. That the plea amounts to the general issue, and is, therefore, defective.

The inconsistency of the defeasance is not perceived. The note given was to be valid only, on the collection of

the drafts or bills. It was, substantially, an agreement to pay the sum named, should the bills be paid by Evans. And any loss or expense was to be allowed the defendant, Samuel K. Page, by Stevens. That is, if a part of the sums called for in the bills should not be received, or the holders of the bills should be subjected to expense, the one or the other or both, as might occur, should be deducted from the note given to him by the defendants. The effect of this arrangement would seem to be, to constitute Samuel K. Page the agent of Stevens, to collect the bills, and that the liability should depend upon the amount that should be received.

It is objected, that there is no sufficient averment in the plea, that due diligence has been used to collect the bills of exchange.

There is an averment that at the time the first bill fell due, Evans, the acceptor, was insolvent, and had been so for some time before. This, we think, is sufficient. Under the agreement, the liability of the defendants depended upon the receipt of the money from Evans, and not on any other condition. An agent to whom a bill is sent for collection, may be made liable, if he shall be guilty of negligence in making a demand of the acceptor, and giving notice to the other parties to the bill, through which the holder loses his recourse. But the terms of the agreement set forth in the plea, imposes no such condition; and the demurrer admits the agreement as stated in the plea.

It is also objected, that in the plea there is no offer to return the bills of exchange, and no averment that the defendants have them ready to deliver up to the plaintiff.

Until the acceptances of Evans were all paid, there was to be no liability on the note; and when the acceptances were paid, they and the due bill were to be produced. The condition was not, as is contended, that if the acceptances were not paid they were to be produced with the note; for

until they were paid, the payment of the note was not to be enforced; and if the acceptances were paid, then the acceptor, of course, would be entitled to the possession of them. The intention of the parties is not clear on this point. It is enough, however, that the defence set up in the plea shows that, under the agreement, no liability has attached to the defendants; and that no right of action has accrued to the plaintiff, he having full notice of the agreement, before the assignment of the note to him.

The last cause of demurrer assigned is, that the plea amounts to the general issue, and is therefore demurrable.

Where the defence consists of matter of fact, merely amounting to a denial of such allegations in the declaration as the plaintiff would be bound to prove in support of his case, the plea is bad, as amounting only to the general issue. But in this case, the facts alleged do not deny the execution of the note, but expressly admit it; and matter of avoidance is alleged. This, then, is neither in substance nor in form the general issue. It gives color to the plaintiff's right, but sets up a distinct agreement, which shows that right was conditional, and that the condition on which the liability was to attach has not happened.

Upon the whole, the demurrer is overruled.

On motion, leave is given to file a replication to plea, which being done, the cause was continued.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—JUNE TERM, 1843.

UNITED STATES v. MAGOON.

In trespass for digging and carrying away lead ore from the lands of the United States, they are not entitled to recover, as damages, the value of the ore after it is dug.

The injury done the soil is the gist of the action; and ore extracted must be considered in aggravation of the damages.

A trespasser is not to be placed on the same footing with a lessee.

Mr. Butterfield, district attorney, appeared for the plaintiffs.
Mr. Logan, for the defendants.

OPINION OF THE COURT.

THIS is an action of trespass, charging the defendant with digging and carrying away a large amount of lead from the lands of the United States.

The defendant suffered a default, and the jury was sworn to assess the damages, &c.

It was proved that defendant entered upon the lands of the United States, dug a large quantity of ore, and conveyed it away.

The plaintiffs contended that they are entitled to the value of the ore, after it was dug; but the court instructed the jury, that that was not the measure of damages, but the injury done to the soil by the trespass. That the digging

Babcock v. Stone, Glover and Manning.

and carrying away by the same person, is presumed to be a continuous act, and the lead ore removed must be considered in aggravation of the trespass upon the soil.

Neither is the rate at which leases are made for these mineral lands, a proper criterion of damages. A trespasser is not to be put upon the footing of a lessee.

The jury assessed the damages at — dollars. Judgment.

BABCOCK v. STONE, GLOVER AND MANNING.

A, being a partner in two firms, draws a bill by one firm on the other, payable to himself, for his individual debt, and accepted by such firm, cannot be recovered by the payee against the drawers or acceptors.

But where in the ordinary course of business, and before the maturity of the bill, it is assigned by the payee, without notice, the payment of the bill, by the indorsee can be enforced.

Where men associate in partnership, they give a credit to the individuals composing the firm, and where a loss must be sustained, it should fall upon those who placed the higher confidence in the fraudulent person.

On this ground, where there is no notice of fraud, a partner may often bind his partners, though his act be a fraud on the firm.

Messrs. *Thomas & Keating* appeared for the defendants.

OPINION OF THE COURT.

This action is brought by the plaintiff as the indorsee and holder of the following bill :

“Alton, June 9th, 1836. Twelve months after date, pay to the order of John B. Glover, twenty-seven hundred forty-one dollars ninety-two cents, value received, and charge the same to the account of Stone, Manning & Co.” To James Debow & Co., St. Louis, Missouri. Accepted by James Debow & Co., and also indorsed, “Pay to Samuel Babcock, John B. Glover.”

The defendants pleaded that the bill of exchange was made by the said John B. Glover, for the purpose of securing an individual debt, and not an account of the firm and partnership of James Debow & Co., or for any indebtedment of theirs. That Glover accepted the same in the name of defendants, without the knowledge or consent of his partners, but for the individual benefit of the said Glover. That the plaintiff took the bill, well knowing that it was made and accepted as aforesaid. That the bill was for the individual debt of the said John B. Glover, &c. To this the plaintiff replied, that when the bill was so as aforesaid transferred to him, he did not know that said bill of exchange was drawn by said Glover, in the name of Stone, Manning & Co., and accepted by said Glover, in the name of James Debow & Co., to secure his individual debt, &c.

To this replication the defendants demurred.

It is clear that Glover could not have recovered as payee against the drawers or acceptors of this bill. It was created by him, he being a partner of the drawers and acceptors, not to pay a partnership debt, but for his individual benefit. This was a fraud upon his partners. But he negotiated it to Babcock, the plaintiff, who is averred to be an innocent holder, having had, at the time of the indorsement, no notice of the fraud. Being an indorsee, without notice, it becomes a question whether he or the partners of Glover shall lose the amount of the bill. The bill was indorsed by Glover to the plaintiff, before its maturity. In Story on Partnership, 161, it is said, "that by forming a partnership, the partners declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they will respectively do within the scope of the partnership concerns." On this ground the firm is bound for the frauds committed by one of its partners. Where one of two innocent persons must suffer by the act of a

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third person, the rule is just, that he shall suffer, who reposed the higher confidence and credit in such person.

If the bill had been indorsed to the plaintiff after it was due, or out of the ordinary course of business, or under circumstances calculated to excite suspicion, he could have no right to recover. But none of these facts exist, and he must be considered as an innocent holder, before the bill was due, and without notice of any fact which could render the bill suspicious.

The above doctrine is substantially laid down in *Jones et al.*, assignees, v. *Yates*, 9 Barn. & Cres., 532; *Bosanquet et al.* v. *Wray*, 6 Taunt. 597; *Aubart* v. *Moore*, 2 Bos. & Pul., 371; and *Smith* v. *Lusher*, 5 Cowen, 688. The demurrer to the replication is overruled. Judgment.

STRACHEN AND SCOTT v. CLYBURN AND WIFE.

The circuit courts of the United States adopt the local remedies of the respective states.

Spring for the plaintiffs.

Butterfield for defendants.

OPINION OF THE COURT.

THIS is a *scire facias* on a mortgage regulated by the act of the 17th of January, 1825.

A motion was made to strike this case from the docket, on the ground that the act referred to is local, and does not apply to the courts of the United States. The act named gives a remedy by *sci. fa.* It provides that two *nihil*s shall amount to a service, which shall authorise the plaintiff to proceed to judgment.

This court under various acts of Congress and by virtue of its own rules, adopts the remedies authorised in the state courts, though they may be local and peculiar in each state. In Kentucky, a writ of right, modified by statute, is a common remedy; and that remedy is used in the circuit court of the United States.

Under the statute, the plaintiffs had a right to issue a *scire facias* on the mortgage, and the motion is consequently overruled.

UNITED STATES v. KENNEDY AND CLYBURN.

A witness to be competent must believe in God, and in rewards and punishments.

If these are inflicted in this life, according to his faith, he is competent.

But in such case he may be less under that high moral influence, which is supposed to result from a belief in a state of rewards and punishments in the life to come. This may go to his credibility.

In trespass, where a day is laid in the declaration, and from such day to the commencement of the action, divers trespasses were committed, one trespass, but not divers, may be proved prior to the day named. But divers, may be proved within the time laid.

Butterfield for the plaintiffs.

Arnold for defendants.

OPINION OF THE COURT.

THIS action is brought against the defendants for trespass upon the public lands.

The jury being impannelled, William H. Adams was called as a witness; and being asked whether he believes in the existence of a God, and in a future state of rewards and punishment, answered that he believed in a God, and that all offences were punished in this life, and not in the next.

The witness having answered the question, without objection, it will be received. But, it may be proper to remark, that the modern practice is, not to interrogate the witness as to his religious belief. Formerly, the witness was examined on this point, either before or after he was sworn. But it is now proved by witnesses, who may have learned the views of the witness on this subject from his own declarations. And this seems to be more reasonable and more conformable to the spirit of our institutions.

However highly the witness may appreciate character, and however strongly he may detest the crime of perjury, from the infamy attached to it, still the law requires a higher obligation to operate upon the conscience of the witness. He must believe in a superintending providence, who punishes crime. This presupposes a belief in a future state. The authorities are divided on the point whether, if the rewards and punishments, according to the belief of the witness, are to be inflicted in this life, he is competent. *Commonwealth v. Bachelor*, 4 Am. Jurist 81. In *Hunscom v. Hunscom*, 15 Mass. Rep. 184, the court held that mere disbelief in a future existence went only to the credibility. Contra, *Atwood v. Walton*, 7 Conn. 66.

In the case of *Omichaund v. Barker*, Willes 545; 1 Atk. 21. S. C., where the subject was largely discussed, it was held, that the belief of a God, and that he will reward and punish us according to our deserts, is essential; but whether the rewards and punishments are limited to this life, or the next, is not material. At least this view is sustained by the weight of authority. The individual who believes that a bad act will be punished in this life, and a good one rewarded, by God, cannot be said to act free from that moral influence of hope and fear which the law contemplates as the best security against punishment. This influence will operate more strongly, when referred to the future than the present life. And it would seem, as stated

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in some of the authorities, that a disbelief in a state of future rewards and punishments should go to the credibility of the witness, and not to his competency. 1 Greenleaf's Ev. sec. 368, 369 and 370.

The witness was sworn, and also D. Kinsey, who proved that the defendants, at different times, and for a series of years, were in the practice of cutting timber on the public land, and using it for their own purposes.

It was made to appear that the pre-emption law of 1838 embraced the case of the defendant Clyburn, but he took no step during the continuance of the law to perfect his title. He is, therefore, liable to an action of trespass after the expiration of the pre-emption law.

The declaration laid the trespass from 1st of October to the time of bringing the action. And the court held, that a single trespass might be proved anterior to the time laid, but not divers. That divers trespasses might be proved within the time laid.

The jury found for plaintiffs, &c. Judgment.

LAWRENCE, GAITHER ET AL V. DAVIS ET AL.

An assignment of property to creditors, or for their benefit, to others, cannot be held void for want of consideration.

To give an assignment of property validity, the assignees must assent to it.

By the common law a debtor may give a preference to certain creditors over others.

And this is not prohibited by any statute of Illinois.

Mr. Chickering for complainants.

Messrs. Strong and Pickering for defendants.

OPINION OF THE COURT.

THIS bill is brought by the complainants, who are creditors of the defendants, to set aside an assignment of their effects by the defendants for the benefit of certain creditors, giving a preference to certain persons named. The plaintiffs are named in the assignment, but Hamly, Davis and McAfee are preferred to them.

1. This assignment it is contended is void, because it was made without consideration.

An assignment to creditors, or to individuals for the benefit of certain creditors, cannot be said to be without consideration.

2. It is also objected that the creditors have not accepted the assignment. That the complainants being creditors have not accepted it.

In making an assignment of property, as in every other case of contract, the assent of at least two persons is necessary to its validity. A debtor cannot change his relation to his creditors by a voluntary assignment of his property to them. If, therefore, he make an assignment, and his creditors do not accept it, there is no change of property; and legal redress is open to the creditors as before the attempted assignment.

That which purports to have been done for the benefit of creditors, and which was manifestly to their advantage, will be presumed to have been done with their assent, unless the contrary appear.

3. But in the third place, it is contended that the assignment was conditional, and that the condition has not been complied with. The condition was, "that the assignees shall and will render an account, &c. to a major part of the creditors, and that they shall sanction the assignment before it can take effect. And it is earnestly averred that

the acquiescence of a majority has not been shown. 2 Story's Eq. 302-3. *Garrard v. Lord Lauderdale*, 5 Eng. Chan. 1. 3 Simons 1.

This last objection has not been answered, and it seems fatal to the assignment. A majority of the creditors have not assented to it, and without this, by the terms of the assignment, it cannot take effect.

By the common law, a debtor may give a preference to a part of his creditors. Under the bankrupt law this could not be done; nor is it permitted in several of the states, where the law secures an equal distribution of the effects of an insolvent among his creditors. It is believed that there is nothing in the statutes of Illinois, which renders a preference to certain creditors fraudulent or void. But the assignment is set aside and annulled, on the ground that the condition of it has never been complied with.

UNITED STATES v. WANN AND BENNETT.

The sureties of a receiver of public monies are responsible for any neglect of the receiver which appertains to the duties of his office.

But, the government cannot pay an extravagant sum, for the performance of the labor neglected by the receiver, and charge his sureties with such sum.

The government in such a case is entitled to recover what shall be a reasonable compensation for the labor performed.

Mr. Butterfield, district attorney, for the plaintiffs.

Messrs. Breese and Campbell for defendants.

OPINION OF THE COURT.

THE action is brought against the defendants as sureties of Evans, late receiver of public monies. The receiver

Bronson v. Kensey et al.

neglected to bring up his books, and his successor was required to perform that duty, for which he received from the government three thousand dollars. And the plaintiffs claim the above sum from the sureties of the receiver, he being dead.

The court instructed the jury that the defendants were responsible for the faithful performance of his duties by the late receiver. But that the sum paid by the government for bringing up the books is not to govern them in their verdict, unless they shall think it was a reasonable compensation for the labor performed. It is no more in the power of the government than of an individual, to charge an extravagant sum for neglected duty, by paying such sum to a person who did the work. The plaintiffs are entitled to recover, what the jury shall think will be a reasonable compensation for making the necessary entries in the books of the late receiver, which he, in his life time, had neglected to make. The jury found verdict in pursuance of this instruction, &c. Judgment.

BRONSON v. KENSEY ET AL.

A motion to produce a paper, in the possession of the plaintiff, which is necessary to enable the defendants to plead, may be granted in the discretion of the court, although no notice has been given.

But, where the possession of a paper is desired to be used in evidence, a notice is necessary.

Mr. *Arnold* for the plaintiff.

Mr. *Butterfield* for the defendants.

OPINION OF THE COURT.

THIS action is brought on a penal bond of sixteen thousand dollars, to pay eight thousand dollars. And it is alleged that the notes, amounting to eight thousand dollars, were given when, in fact, but four thousand dollars were received, and it is suggested that the notes will show the above state of facts. The notes, it is averred, were given before the penal bond, and on this suggestion of facts a motion is made by defendants' counsel that the plaintiff be required to produce the above notes, to enable them to plead in the case.

This motion was opposed on the ground that it is made too late, and that no notice has been given.

A notice to the opposite party is necessary when the object is, to obtain a paper in his possession, to be used in evidence. But this is not strictly the object of the present motion. It is to produce certain notes, which for the reasons stated are necessary to enable the defendants to make their defence.

The court directed the plaintiff to produce the notes.

STICKNEY v. BANK OF ILLINOIS.

The Bank of Missouri having bills to the amount of one hundred thousand dollars of the Bank of Illinois, the latter bank agreed to draw drafts on New York for the amount, and leave its bills in the hands of a third party as collateral security, and also to place ten thousand dollars in addition in bills, to cover damages of protest. The bills were protested—and suit brought against the Bank of Illinois on the protested bills; the above agreement cannot be pleaded in bar of the action.

Nor can an agreement, should the drafts be protested, to deliver an amount of the said bills, to cover the damages, be so pleaded.

Stickney v. Bank of Illinois.

Messrs. *Keating and Strong*, for plaintiff.

Messrs. *Logan and Harden*, for defendant.

OPINION OF THE COURT.

THIS action is brought for the benefit of the Bank of Missouri, and is founded on bills of exchange amounting to the sum of one hundred thousand dollars.

The defendant pleaded five pleas.

1. The general issue.

2. Payment.

3 and 4. That the Bank of Missouri by their agents entered into an agreement with the agents of the Bank of Illinois, that the latter should take up one hundred thousand dollars of its notes, held by the Bank of Missouri, by drawing bills on New York, acceptances being waived, for the above amount, payable in ninety and one hundred and twenty days, &c. The Missouri bank was to deposit the bills of the Illinois bank in the hands of P. Choteau, jun. & Co. to be held in trust for the purpose of covering the bills so as aforesaid to be drawn. And the agents of the Bank of Illinois deposited with Choteau & Co. ten thousand dollars of its bills, so as to secure the Bank of Missouri in damages in the event of failure to meet said bills so as aforesaid drawn by the cashier of the Bank of Illinois, at Alton, which notes are to be held in trust as provided by the arrangement made between the two banks.

The drafts and the one hundred thousand dollars were delivered to Choteau & Co. to be held subject to the ratification of the directors of the bank of Shawneetown. Should the agreement not be ratified, the one hundred thousand dollars were to be returned to the Bank of Missouri by Choteau & Co., and the ten thousand dollars and the drafts were to be delivered to the Bank of Illinois.

The drafts and arrangement were ratified by the Shawnee-

town bank. Drafts were sent on, and were protested. Suits being brought upon the drafts, the above agreement is pleaded in bar, as showing a failure of consideration.

5. This plea alleged an agreement different from the above, to wit, that it was agreed that should the bills of exchange be protested, the said Choteau was to deliver as much of the said notes as would cover the damages of protest to the Bank of Missouri, estimating them at their nominal value, &c. There is a reference in this plea also to the written agreement.

The defendants demurred to the 3d, 4th, and 5th pleas.

If the agreement set forth in the third and fourth pleas, should not be ratified by the Bank of Illinois at Shawneetown, the one hundred thousand dollars in notes were to be returned to the Bank of Missouri, and the ten thousand dollars, with the drafts, to the Bank of Illinois. But the agreement was ratified by that bank; consequently the agreement did not require the return of the notes as above stated. The drafts were drawn, and the notes were retained in the hands of Choteau & Co. as collateral. Now if the drawee of the bills had failed to present them for payment and give notice of non payment, recourse against the drawers of the bills would have been lost. And having made the demand and protest, and given notice, the holder of the bills had a right to prosecute the Bank of Illinois as drawers, or might, perhaps, have sued on the notes in the hands of Choteau & Co. Had suits been brought on these notes, the dishonored bills could not have been set up as a defence to the action. And as the drafts were received in payment, and the notes retained as collateral, there can be no question that the holder could sue, as has been done in this case, on the protested drafts.

The agreement set up in the fifth plea, constitutes no bar to the action. It simply alleges in the event of the protest

of the drafts, bills to cover the damages of protest should be delivered by Choteau & Co. to the Bank of Missouri. This is no answer to the action on the protested drafts, and therefore, the plea is demurrable. The demurrers are sustained.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—JULY TERM, 1843.

**N. C. McLEAN, ASSIGNEE OF MAHARDS v. THE LAFAYETTE BANK,
J. S. AND M. BUCKINGHAM AND OTHERS.**

In all cases arising under the bankrupt law, the circuit court has concurrent jurisdiction with the district court.

A conveyance of property, in contemplation of a state of insolvency, is void under the bankrupt law.

And any mortgage or other lien which is intended to give a preference to one or more creditors over others, is also void.

The circuit court has jurisdiction in all cases where a suit is brought by the assignee of a bankrupt, or against him.

All the property and rights of the bankrupt are vested in the assignee, not only from the decree of bankruptcy, but, by relation, from the time of filing the petition. The assignee also represents the creditors.

The bankrupt power is exclusively vested in the federal government.

Congress have not given jurisdiction to the state tribunals to carry into effect the bankrupt law. They have not power to vest such a jurisdiction.

Bona fide liens under the state laws are valid under the bankrupt law; and a state court may enforce such liens.

But if there be fraud in the creation of such liens, and the creditors, through the assignee of the bankrupt, seek to set the liens aside, the district or circuit court of the United States affords the appropriate jurisdiction.

A state court, by the enforcement of a lien, cannot draw to its jurisdiction the administration of the bankrupt law.

Where this effect will result necessarily from the exercise of jurisdiction, the circuit court may interpose by injunction, and stay proceedings in the state court.

At least such interposition is proper until the cause can be heard on its merits.

A warrant of attorney to confess a judgment, the defendant being insolvent, executed within sixty days preceding the filing of the petition, by the bankrupts, cannot authorise the entry of a judgment.

Such judgment, if valid, would create a lien or security within the bankrupt law; and is void.

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An execution issued on such judgment, though levied, creates no lien on the property levied on.

The judgment being invalid, all the proceedings under it are equally so.

The cause was argued by *Wright, Coffin & Miner*, and *Brown & McLean*, for complainant; and by *Chase & Ball*, *W. M. Corry*, and *Fox & Lincoln*, for the several defendants.

OPINION OF THE COURT.

THIS bill is brought by the assignee of John Mahard, Jr. and William Mahard, who are bankrupts, to stay certain proceedings in the state court against the property of the bankrupts. On their schedule the bankrupts returned a large amount of real estate, and also personal property; but the defendants, who are numerous, set up various liens under mortgages, judgments, and levies by execution; and these liens are brought into the state court to be there investigated. Large as the real estate of the bankrupts is, the liens, should they be established, will exhaust it, to the exclusion of a large class of creditors who have proved their claims under the bankrupt law. The complainant represents that the above liens were all created and obtained in fraud of the bankrupt law; and he prays that the defendants may be enjoined from further proceeding in the state court; that their liens may be set aside as fraudulent; and that the property of the bankrupts may be brought into the bankrupt court, to be distributed according to law.

An injunction was allowed on filing the bill, and a motion is now made in behalf of the Lafayette bank and the Buckinghams, to dissolve the injunction. Many if not all of the other defendants are desirous of having the matters of controversy brought into this court.

The mortgage to the Lafayette Bank by the bankrupts was signed the 7th December, 1841, and acknowledged and

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recorded the 13th January, 1842. At October Term, 1842, a decree for a sale of the premises was entered by the superior court.

The petition under the bankrupt law was filed by the mortgagors the 27th May, 1842, and a decree of bankruptcy was made the 20th of July ensuing. The assignee of the bankrupts, and others who claimed an interest in the mortgaged premises, were made parties to the bill filed by the Lafayette Bank; but the assignee made no answer, nor in any form submitted to the jurisdiction of the court. On the 7th April, 1842, a warrant of attorney was executed by the bankrupts to William M. Corry, Esq., authorising him to confess a judgment against them in favor of J. S. and M. Buckingham, for a sum exceeding fourteen thousand dollars. This was done at the urgent request of the Buckinghams, and it is agreed, that, at the time, the Mahards were insolvent. On the 8th April, a judgment was confessed, and on the 21st of the ensuing month, execution having been issued, a levy was made on certain personal property, which was afterwards sold, by consent of parties, under the order of the superior court acting as a court of chancery. The proceeds of the sale were brought into that court to be disposed of as it might direct. And it appears that an injunction, which had been previously granted by the superior court to restrain the Buckinghams from proceeding on their execution, was dissolved. From this decision there was an appeal to the supreme court of the state, which continues the injunction.

On the part of the Lafayette Bank, it is contended that this court has no jurisdiction; that the decree of the superior court for the sale of the mortgaged premises is final and conclusive on all parties; that, jurisdiction having attached to that court by the filing of the bill to foreclose the mortgage, it may examine and determine all questions arising under the bankrupt law; and that, as process was served

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on the assignee, he was a party to those proceedings. On the other hand, it is contended by the assignee, that the mortgage was executed by the bankrupts in contemplation of bankruptcy, to give a preference to the Bank over other creditors, and that the mortgage is void under the bankrupt law.

The second section of this law provides, "that all future payments, securities, conveyances, or transfers of property, &c. given by any bankrupt in contemplation of bankruptcy, giving any creditor, &c. any preference in priority over the general creditors of such bankrupt, shall be void. And the assignee shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankrupt."

In the same section, it is declared, that "all the property and right of property of the bankrupt, by operation of law, is vested in his assignee; and the assignee is vested with all the rights, powers, &c. in and over the property 'which the bankrupt had *before* or at the time of his bankruptcy, declared as aforesaid.'"

In the sixth section, it is provided that, "the jurisdiction of the district court shall extend to all cases and controversies in bankruptcies arising between a creditor and the bankrupt, and between such creditor and the assignee." And, in the eighth section, concurrent jurisdiction is given to the circuit court, with the district court, "of all suits at law and in equity, which may or shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or right of property of the bankrupt, transferrable to or vested in such assignee."

The jurisdiction vested in this court, under these sections, is ample, and reaches every possible controversy which can arise, in the collection and distribution of the effects of the bankrupt. Of whatsoever nature his rights may be, the assignee may invoke the jurisdiction of this court for

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relief. But he may do more than this. He is not only vested by the law with all the rights of the Bankrupt, but with the rights of creditors also. He may set aside a fraudulent conveyance of the bankrupt, which the bankrupt himself could not do. In this respect the assignee represents the general creditors. And in this aspect he stands in the present case.

It is presumed that no one will doubt the powers of Congress to confer this jurisdiction. The power "to pass uniform laws on the subject of bankruptcies throughout the United States," is given in the Constitution, and belongs to the same class of powers, "as to regulate commerce, establish a uniform rule of naturalization, coin money, establish post-offices and post roads, and to declare war." These, in my judgment, are all exclusive powers.

It is true, the supreme court have held that a state may pass a bankrupt law, to operate upon all contracts subsequently made within the state. But I cannot comprehend the principle on which this decision rests. No state can impair the obligations of a contract. That a release, under a bankrupt law, from a contract, does impair its obligation, no one will deny. How can a state exercise this power by any supposed assent of the parties to the contract. Does such a law become a part of the contract, and is the power, therefore, constitutional? This would be a ready, if not a safe mode, of acquiring power by a state, to do that which the federal constitution inhibits. It has been held that the assent of a state enlarged the federal power, so as to enable it to make a turnpike road or other improvement through the territory of a state, which, without such assent, would be unconstitutional. These positions, it seems to me, are equally erroneous. In neither case can the power be derived from the assent or contract of a state or individuals.

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The obligation of a contract is as much impaired by a bankrupt law which operates upon future, as upon past contracts. The power is inhibited. Can a state, by the passage of a law, enlarge its constitutional power. Can it say that no contracts shall be made in future, which may not be impaired, under its bankrupt law. Nothing can be more unconstitutional than the notion, that the power vested in the federal government, which, from its nature, must be exclusive, can be exercised by a state, until the same power is exercised by congress. Such a conception seems to me to border upon the ludicrous. I see a state, like the holder of a floating land warrant, hunting among the federal powers for some vacant spot on which to rest, as a temporary occupant; and which must be abandoned so soon as a notice is served on it to quit. A state acts upon its own inherent sovereignty, and upon no such impracticable notion.

The bankrupt power, from its nature, must be exclusive. It must be uniform. A system of bankruptcy has been adopted, and its details are spread out in this act. And summary and extraordinary powers are given to the courts of the United States, to carry out and give effect to this system.

This power cannot be exercised by the state courts. Their powers are derived from different sovereignties, to whom they are amenable. Congress had not the power to impose this jurisdiction on the state courts. They have not attempted to do so.

Congress have adopted the state laws that relate to the practice of the courts; but the courts of the United States have decided that they cannot execute the insolvent laws of a state. Their organization does not admit of the exercise of the powers necessary to give relief under these laws. The objection is much stronger against a state

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court giving relief under the bankrupt act. The power belongs to the federal government exclusively, both as regards the enactment of the law and giving effect to it.

Mortgages and all *bona fide* liens under the laws of a state, and not in fraud of the bankrupt law, are declared to be valid. And the question is asked, have not the state courts power to enforce these liens? The answer may be in the affirmative, but subject to some restriction. The mortgage under consideration, if the allegations of the bill shall be sustained, may constitute one of the exceptions to the rule.

That the mortgagee might have filed his bill to foreclose in the circuit court, seems to be clear. The assignee is a necessary party, and the law gives jurisdiction to this court "in all cases between a creditor and the assignee." But he may not have been compelled to sue in this court. Some doubt, however, may be entertained, whether the assignee, being an officer of the law, and bound to discharge his duties under the special direction of the court, should be subjected to any other jurisdiction. He has an undoubted power to redeem the property by paying off the mortgage, and he is entitled, in behalf of the creditors, to the surplus.

If the assignee may be drawn into the state court on one lien, he may be so treated in all cases of liens. The present case affords a fit illustration of the principle. Some twelve or fifteen liens are set up on the property of these bankrupts. The property is large and valuable. And the validity of almost all these liens depends upon the construction of the bankrupt law. The entire property of the bankrupts will be absorbed in this way. Now, if this be a rightful exercise of jurisdiction by a state court, although the bankrupt law be uniform in its provisions, it cannot be so in its effects; a state court may hold the act or a part of the act to be unconstitutional. That a uniform construc-

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tion shall be given to the act, under such an administration of it, is not to be expected. And if this be a proper exercise of jurisdiction, there can be no revisory power in the courts of the United States. There certainly can be none, unless it shall be under the 25th section of the judiciary act of 1789, to review a decision of the supreme court of the state. This would be a most dilatory and ineffectual mode of executing the bankrupt act; a mode, certainly never contemplated by Congress.

On general principles, a state court has an undoubted right to determine a question arising under a law of the United States. This, however, is subject to the revisory power of the supreme court of the United States, as above stated. But questions which involve the efficacy of the bankrupt law, and are essentially connected with its uniform administration, it would seem cannot be brought under the same rule.

No light is shed upon this question by the action of the English courts. They all form a part of the same system, and derive their powers from the same sovereignty. Here the judicial power is exercised under different sovereignties, having appropriate powers to give effect to the laws.

Under the bankrupt law of 1800, I am aware, that this jurisdiction, to some extent, was exercised by the state courts. I have not compared that act with the one under consideration, to see whether its provisions in this respect, were different from the present act.

But the question in the present case, does not depend upon the ordinary exercise of jurisdiction by the state courts, for the enforcement of liens against a bankrupt. The complainant in his bill alleges that all the liens involved in this controversy, were given in fraud of the bankrupt act. Every creditor of the bankrupts is interested in this case. If the supposed liens are void, the property of the bankrupts will be distributed among the

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creditors generally ; but if they are valid, the general creditor can receive nothing. And whether these liens are valid or not, must depend upon the construction of the bankrupt act. Shall these questions be drawn into the state court, and there decided. From the time of filing the petition, by relation, the property of the bankrupts became vested in the assignee. As before remarked, he not only represents the interests of the bankrupts, but the interests of the creditors also. The interests of those who have special liens can as well be protected in this court, as in the state court. They are protected by the law. Why then should the fact of special liens draw this whole controversy into the state court, and take it from the appropriate jurisdiction; a jurisdiction specially provided and vested with all the necessary powers to make a final decision in the case. This the state court cannot do. Should it undertake to determine the validity of the liens under the bankrupt law, and their priorities, still if there be a surplus, it must be handed over to the assignee to be brought into the bankrupt court, for distribution among the creditors. These creditors, through the assignee, are parties in this court, and by its decree the validity of the liens under the bankrupt act, their priorities, and the distribution of the surplus, can all be finally adjusted.

The bankrupt power overrides the contract and puts an end to it. And had there been no reservation in behalf of *bona fide* liens, they, with other contracts of the bankrupts, would have been abrogated. Shall this exception in the law, in effect, take, at the pleasure of the mortgage creditor, the administration of the bankrupt law into the courts of the state. This would be a matter of little importance in a case free from all difficulty. But where the foundation of the liens depends upon the continuation of the bankrupt act, it would seem, the jurisdiction under which the law was passed should carry it into effect. And this

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view acquires force from the fact, that the creditors, who are deeply interested in the case, have invoked the powers of the bankrupt court, by proving their claims. And the assignee, their agent, calls specially on the court to interpose its powers and protect the interests committed to it. Has it power to do so? If it has not, there is a great and radical defect in the system. Over the action of the state court the federal court can exercise no control. A foreclosure may be decreed, and so short a time allowed for the payment of the money, as to be unavailing to the assignee. Or the state court may order the sale of the premises, which, of course, must be under the law of the state which requires improved property to sell for two-thirds of its value. And unless the mortgagee shall purchase the property, it may not sell for many years. A connivance between the bankrupt and the mortgagee may, in this manner, keep from his creditors his whole estate.

It may be said that the equity of redemption may be sold, under the order of the bankrupt court. But would that court order the sale of the equity of redemption, unless the parties interested were brought before it, and the extent of the liens were judicially ascertained. The district and circuit courts are vested with full chancery and common law powers, to act in all cases arising under the bankrupt law. They possess, in this respect, all the powers of the English common law and chancery courts, over questions of bankruptcy. And is not this jurisdiction exclusive?

I am aware that the argument *ab inconvenienti*, is not a legitimate ground of jurisdiction. But in a case like the present, can it be disregarded. Our system of sovereignties is extremely complicated. The state and federal powers, like the colors of the rainbow, are found to intermix, and it may be sometimes difficult, if not impracticable, to determine the exact limit of either. And when this is the case, what is there but the argument *ab inconvenienti* to

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lead the judicial mind to a just conclusion. This, and this only, under the exercise of an enlightened forbearance, can preserve the harmony and efficiency of our system.

It has been shown that the federal court possesses a perfect jurisdiction over all the interests involved in the present case. That the parties are now before it. That the state court has but, at most, a jurisdiction over a part of the case. That it cannot enter a decree that shall settle the conflicting interests of all concerned.

In principle, the case seems not to differ from an application to the federal court to discharge a defendant from imprisonment, under the insolvent laws of a state. Such laws generally provide, that on filing his schedule of property under oath, and giving security, he shall be discharged from imprisonment. But the federal court has uniformly refused such applications, on the ground that it could not carry out and give effect to the insolvent law.

The act of bankruptcy brings into the bankrupt court, all the interests of the bankrupt. And it seems to be reasonable that that court should exercise an exclusive jurisdiction over those interests. It is no sufficient reason against this jurisdiction, that other interests arising under liens are involved. Those interests are valid under the bankrupt law, being excepted out of its operation, and will be protected by the bankrupt court. But do not those interests necessarily follow the property into the bankrupt court, where it is drawn by the act of bankruptcy? In overruling the motion to dissolve the injunction, as to the Lafayette bank, the question of jurisdiction is not finally decided. It may again be discussed and considered on the final hearing. It is enough now to say, that from the allegations of fraud in the bill and other circumstances which have been adverted to, the court will not now dissolve the injunction on the ground that it has no jurisdiction of the case. The answer denies, generally, the allegations of the

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bill; but so complicated are the numerous interests involved, that the continuance of the injunction until the final hearing, seems to be required. The motion to dissolve the injunction, as regards the interest of the Lafayette Bank, is overruled.

The lien set up by the Buckinghams will be now considered. The warrant to confess the judgment was dated the 7th of April, 1842, and judgment was confessed under it the day following. On the 21st of May, ensuing, the execution was levied.

The petition of the bankrupts was filed the 27th of May, and a decree of bankruptcy entered the 20th of July.

The proceeding of the Buckinghams is void, it is insisted, under the second section of the bankrupt act, which provides, "that all future payments, securities, conveyances, or transfers of property, or agreements made or given, by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditors, &c. any preference or priority over the general creditors of such bankrupt, shall be void, &c. and the assignee shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankruptcy." The warrant of attorney, judgment, and levy of the execution were within two months preceding the filing of the petition; and it is admitted that the Mahards were insolvent at the time the warrant of attorney was given. The only question, then, is, whether this proceeding was void, under the above section.

It is contended that the warrant of attorney is not a security or an agreement within the act. This may be admitted; and, if nothing had been done under the power, the argument would have been unanswerable. But is not the act of the agent, thus constituted, the act of the principals? This will not be denied. The Mahards, then, being insolvent, and within less than sixty days before their petition

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was filed, by their agent specially constituted for that purpose, confessed a judgment in favor of the Buckinghams for an amount exceeding fourteen thousand dollars. A judgment is a security paramount to all other liens of a subsequent date. If valid, it constitutes a lien within the bankrupt act. But is this a valid judgment? The second section of the act provides, "that all dealings and transactions by and with any bankrupt *bona fide* made and entered into more than two months before the petition filed against him, or by him, shall not be invalidated or affected by this act." This, by the strongest implication, declares that any transaction of the above nature, "made and entered into" less "than two months before the petition was filed," shall be void. But strong and unanswerable as this position seems to be, there is another, if possible, still more conclusive. The warrant of attorney was given, and the judgment confessed, in contemplation of bankruptcy; and if so, the judgment is void, under the bankrupt act; not that it is necessary to show the Mahards, at the time the judgment was confessed, had determined to apply for the benefit of the act; but they were in an acknowledged state of bankruptcy; and this, from the circumstances, must have been known to the Buckinghams; and hence their great solicitude to procure the confession of the judgment. It does not follow that all judgments obtained within two months before filing the petition, are void. A suit commenced in the ordinary mode of proceeding, and prosecuted to judgment, the judgment, though entered within the sixty days, may constitute a valid lien. Whether such a judgment, therefore, be void or not, must depend upon the circumstances under which it is obtained. As regards the judgment of the Buckinghams, it seems to come within the law, not only as to time, but as to the circumstances which invalidate the transaction.

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But it is contended that the lien now under consideration arises from the levy of the execution upon the personal property of the Mahards, which is not within the law: that such a lien is procured from the operation of law, and not from the act of the party. Of what value is the levy, if the judgment be void under the bankrupt act? If the judgment fall, can the levy stand? The argument, that if the judgment were inoperative as a lien, under the bankrupt law, still it is a judgment on which the execution may issue, and a valid levy be made, is more specious than sound. It may be admitted that the judgment may not be void for all purposes; but if it be void, as confessed, in contravention of the bankrupt act, the same principle must invalidate the proceedings on the execution; for such proceedings are equally in contravention of the policy of the act as the confession of the judgment. Indeed, it is a violation of the very letter of the act, by "procuring an execution to be levied." But the judgment, if void under the act, is void for all purposes. No valid rights can arise under it. It is as inoperative as would have been a mortgage or other security given under the same circumstances.

As before remarked, the overruling of the motion to dissolve the injunction will not preclude the party from taking the same ground on the final hearing.

The motion to dissolve the injunction, in regard to the money for which the personal property was sold, claimed by the Buckinghams, is overruled; and the cause is continued.

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An assignment, by an insolvent person, of all his effects for the benefit of his creditors, to one who is not a *bona fide* creditor or purchaser without notice, is void under the second section of the bankrupt law.

Such an assignment is valid, under the laws of the state.

But, being void under the bankrupt act, the property assigned was liable to be levied on by a judgment creditor.

The circuit court has jurisdiction of such a case, to set aside the transfer, direct the liens to be paid *pro rata*, and the property not levied upon to be distributed among the creditors of the bankrupt.

Brown & McLean, for complainant.

Messrs. *Wright, Chase, Walker, Coffin, Miner & McLean*, for the defendants.

OPINION OF THE COURT.

THIS bill is filed to set aside a conveyance of the effects of Lucas to the defendants, which is alleged to have been done in contemplation of bankruptcy. The assignment was made in May, 1842, Lucas then being insolvent, for the benefit of his creditors generally.

At the July term of this court, in 1842, Cowperthwaite and others obtained judgment against Lucas, and at the same term Little & Co. obtained judgment. These judgments were upon suits commenced after the assignment to Meline & Young, and were obtained in the ordinary course of proceedings. On the former judgment, execution was issued on the 4th of November, 1842, and on the latter the 8th of the same month. They were both levied on the 8th, upon the personal property assigned, and in the hands of the assignees. By agreement, the assignees were permitted to sell, and hold the proceeds, subject to the opinion of the court as to the right of property. On the 16th November,

1842, Lucas filed his petition for a discharge, under the bankrupt law, and a decree of bankruptcy was entered on the 28th of January, 1843.

The second section of the bankrupt act declares, "that any conveyances or transfers of property in contemplation of bankruptcy, to any person whatever, not being a *bona fide* creditor, or purchaser for a valuable consideration, without notice, shall be deemed utterly void." The transfer, in this case, was not made to a creditor or to a purchaser, within the act; and although it was made for the benefit of creditors generally, yet, under the act, it was void. That Lucas was bankrupt, at the time of the assignment, is admitted. The court have no difficulty in setting aside the assignment to the defendants; but a question is raised by the judgment creditors, who claim under levies by execution, before the petition of the bankrupt was filed. In answer to this, the assignee contends, that the assignment to the defendants, being an act of bankruptcy, all subsequent liens are void, and in opposition to the claims of creditors, which he represents, should be disregarded.

This is the doctrine in England. An act of bankruptcy overreaches an attachment or an execution. *Barker v. Goodwin*, 9 Ves. 78; 11 Ves. 84. A trader, after an act of bankruptcy, cannot create a lien upon his property. *Copland v. Stein*, 8 Term. 199. By various statutes, however, all *bona fide* transactions with the bankrupt, two months before the date of the commission, are protected, if there be no notice of the act of bankruptcy.

In this respect, our statute is more restrictive than the English statute; and I am not prepared to say, that an assignment, which is fraudulent under the bankrupt law, and in itself an act of bankruptcy, overreaches, under our law, an attachment or execution. The act of bankruptcy in England is tantamount to a filing of the petition under our statute, in most respects. In either case, any subse-

quent transfer of property by the bankrupt, is void. But whether liens are void or not, under our act, which were created more than two months before the petition was filed, must depend upon the peculiar circumstances of each case.

The levies in this case were only made a few days before Lucas filed his petition; but the executions were issued on judgments obtained in a regular course of proceeding; and there are no circumstances in the prosecution of the suits, the obtainment of the judgments, or in suing out the executions, which conduce to show fraud. Fraud is never to be presumed, against the apparent fairness of a transaction; therefore, these judgments, and the proceeding under them, must be held valid.

It is further contended, that the assignment, being valid by the state law, the subsequent levy could create no lien. A levy binds the personal property; but if such property had been transferred, a subsequent levy could not affect the right of the assignee.

By the third section of the act, "to amend the act directing the mode of proceeding in chancery," Swan's Stat. 717, it is provided, that, "all assignments of property in trust, with design to prefer one or more creditors to the exclusion of others, shall be held to enure to the benefit of all the creditors," &c. But the above assignment, being for the benefit of all the creditors, does not come under this provision, and is valid on its face. On this ground, it is insisted that the lien set up by a levy of the executions, is not within the bankrupt act, as it is not a valid lien under the laws of the state.

The assignment is void, under the bankrupt law, as being expressly against its letter; and consequently the property attempted to be transferred was liable to be taken in execution by judgment creditors. Whether a state court could take jurisdiction of this question, which arises under the bankrupt act, need not be considered, as the bill has

McLean, Assignee v. Johnson et al.

been filed in this court. Of the jurisdiction of this court, there can be no doubt.

The assignment will be set aside as void, under the bankrupt act, and the proceeds of the property levied upon will be applied *pro rata* in discharge of the above liens. The effects assigned and not levied upon will be decreed to the complainant, deducting the expenses of sale, &c.

McLEAN, ASSIGNEE, v. JOHNSON ET AL.

An assignment of all the property of a firm, in contemplation of a state of insolvency, is a fraud against the bankrupt act.

Such transfer, within two months preceding the application for relief, is, of itself, strong ground of fraud.

If one of a firm apply for and obtain the benefit of the act, the firm being insolvent, the assignee takes all the effects of the firm.

Relief having been given to the bankrupt, the property must be brought into the bankrupt court, that distribution be made as the law requires.

As at present situated, the bankrupt court has no control over the property.

McLean, for the plaintiff.

How, for the defendants.

OPINION OF THE COURT.

THIS bill is filed by the plaintiff, as assignee of Aldrich, a bankrupt. He filed his petition for the benefit of the bankrupt law, on the 17th of December, 1842; and on the 13th of January ensuing he was declared a bankrupt. The facts agreed were, that the firm, consisting of Otis Aldrich, the above bankrupt, and William L. Aldrich, were insolvent and bankrupt at the time the petition was filed; that they had, on the 8th of December, 1842, assigned all their property, of every kind, to Samuel B. Pierre and

William G. Pierre; and that their agents have in their possession a large amount of property which belonged to the late firm, consisting of goods, &c. amounting to about the sum of ten thousand dollars. The assignment was made in trust to sell the property, and distribute the proceeds, *pro rata*, among the creditors of the firm.

Only nine days before the petition was filed, the assignment was executed. This, in itself, was an act of bankruptcy—as it was done in contemplation of a state of insolvency. The second section of the bankrupt act provides, “that all future payments, securities, conveyances, or transfers of property or agreements made or given by any bankrupt in contemplation of bankruptcy, &c.; and all other payments, securities, conveyances, or transfers of property or agreements made or given by such bankrupt, in contemplation of bankruptcy, to any person or persons whatsoever, not being a *bona fide* creditor, or purchaser for a valuable consideration without notice, shall be deemed utterly void, and a fraud upon the act; and the assignee may claim the same,” &c. The assignees were not creditors, and the fact that the assignment was made within two months preceding the application for relief, is, under the second section, if not in terms, impliedly fraudulent.

The fourteenth section of the act provides, that the application for relief by one partner, the firm being insolvent, gives to the assignee the assets of the firm.

On the part of the defendants, it is insisted that, under the assignment, the same disposition of the property will be made, as directed by the bankrupt act; and that, as the assignment is not void, but only voidable, it can only be set aside by the creditors. That the creditors, or a greater part of them, are content with the disposition of the property; and that, as a matter of policy, debtors and creditors should not only be permitted, but encouraged to settle their own affairs.

The bankrupt has asked and obtained relief under the law, and he must submit to all the provisions of the act. It is only upon the ground that the assignment shall be declared fraudulent, the property can be placed under the bankrupt court. The assignee appointed by that court, in all his acts, is under the immediate directions of that court, and he has given ample security for the faithful execution of the trust. The assignees may not carry out the trust, and for any failure in this respect, the creditors or the bankrupt would be obliged to ask the aid of a court of chancery.

In this view it is important, and, indeed, indispensable that the property should be carried into the bankrupt court, that distribution of it may be made to the creditors of the firm, as the law requires.

If the creditors have consented to the assignment, why have they not executed releases to the firm?

A decree will be entered, declaring the voluntary assignment void, and setting it aside. Where the assets have been changed by the assignees, the present plaintiff may receive the money or other proceeds in lieu thereof.

DUNDAS ET AL V. BOWLER.

The assignee of a mortgage may file a bill of foreclosure in the federal court, though his assignor could not have done so.

Such a bill acts upon the estate as directly as an action of ejectment.

An ejectment may be brought by the assignee of the mortgage, and the jurisdiction of the court cannot be doubted.

The constitution gives jurisdiction where the parties live in different states; and in so far as the eleventh section of the act of 1789 is restrictive of this right, it is in conflict with the constitution.

This has not been so ruled heretofore; but the attention of the court does not seem to have been strongly directed to the point.

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The restriction of the above section seems to have been designed to act upon negotiable paper.

It has been construed to extend to other choses in action.

But no decision has gone so far as to exclude the jurisdiction of this court, on a bill to foreclose a mortgage, by the assignee of the mortgagee, being a citizen of another state.

Such a bill acts upon the land, and the assignment of a mortgage is not within the above section.

Mr. Worthington, for the plaintiffs.

Messrs. Wright, Coffin & Fox, for the defendant.

OPINION OF THE COURT.

THIS bill was filed to foreclose a mortgage. The mortgage was executed by Bowler to Shoenberger, both being citizens of Ohio; and by the latter it was assigned to the Bank of the United States, of the state of Pennsylvania. The bank assigned to the plaintiffs, who are citizens of Pennsylvania, in trust for certain purposes.

The question is, whether the court have jurisdiction of the case?

The second section of the third article of the Constitution of the United States provides, that, "the judicial power shall extend to controversies between citizens of different states." And the eleventh section of the Judiciary Act of 1789 declares, "the courts of the United States shall have jurisdiction where the amount in dispute exceeds five hundred dollars, between citizens of different states, one of whom is a citizen of the state where the suit is brought." And the same section provides, "that no circuit or district court shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover such contents, if no assignment had been made, except in cases of foreign bills of exchange."

This statute is in conflict with the constitution. The constitution declares, the judicial power shall extend to controversies between citizens of different states; but the law declares that the court shall not have jurisdiction between citizens of different states, where the action is brought by the assignee of a chose in action, unless the assignor could have sued in the same court. I am aware that in *Shute v. Davis*, 1 Peters, C. C. Reports, it was held that the circuit court has no other jurisdiction than that which is given by the same statute.

Where, to carry out a power given in the constitution, legislation is necessary, the judicial power cannot act until the mode of its exercise shall be provided. But whether the case under consideration is of this class, is the question.

In *DeLouis v. Bois et al.* 2 Gallis. 398, the court say, that the expressions, "admiralty and maritime jurisdiction," in the Constitution of the United States, "give jurisdiction of all things done upon and relating to the sea," &c. And in the case of the *Post Master General v. Early et al.* 12 Wheat. 136, the court held, "that the circuit courts of the United States have jurisdiction under the constitution, &c. of suits brought by the Post Master General of the United States on bonds given to him by a deputy post master, though no law required such bond."

In the case of *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters, 613, the court held, that, under the provision of the constitution in regard to fugitives from labor, the master may seize his slave and remove him from the state in which he is found, if he can do so without any breach of the peace. That this remedy is open to him; although the act of Congress provides, that the claim of the master shall be asserted before some judicial officer.

Now it would seem if, in this respect, the right of the master is not restricted, by positive legislation on the subject, much less is the right of a citizen of another state to

bring suit in the federal court. If redress of a wrong is given, by the constitution to an individual, more clearly and safely is it given when the remedy is sought by action.

That the judicial power shall extend to controversies between citizens of different states, is clearly and in terms declared in the constitution. Where suit is brought by the assignee of a note against the maker, who lives in a different state, the case is literally within the constitution; and yet the act of Congress declares the jurisdiction shall depend not alone upon the citizenship of the parties on the record, but also upon the citizenship of those by whom the note may have been negotiated. In so far as this law is restrictive of the constitutional right of a non-resident, it is, in my judgment, unconstitutional. If Congress can impose this restriction, they may go farther, and impose other restrictions, as their discretion may dictate. In this way a constitutional right may be modified or taken away in whole or in part, as Congress may determine. This is a new and most dangerous principle, and cannot be maintained. It is too late to say that a constitutional right, though explicitly given, cannot be carried into effect, except through legislative action. No legislation was required; and the only inquiry is, whether a legislative act can abrogate the right thus given.

I am aware that the practice of the courts of the United States has been different, and that, by frequent decisions, they have sanctioned the law; and I am also aware that this has been done without inquiry, as to the validity of the act. Its constitutionality has not been questioned, and, after so many years of acquiescence, it may excite some surprise that it is now questioned.

Satisfied as I am that the act restrictive of a constitutional right should be held void, yet, by the course of decisions made on the act under consideration, I cannot rest my decision on its unconstitutionality. I have referred to it

with the view not to declare it void, but to show, that, as it is clearly restrictive of a constitutional right, it should receive a liberal construction. Keeping this in view, the decisions under the act will be referred to.

Effect was given to the eleventh section, in the case of *Turner v. Bank of North America*, 4 Dall. 8, and no doubt of its constitutionality is suggested. And so in *Montalet v. Murray*, 4 Cranch, 46; *Mollan v. Torrance*, 9 Wheat. 537. But the case of *Sere & Laralde v. Pitot et al.* 6 Cranch, 332, is supposed to have a more direct bearing on the point now before us. That was a case where an alien, who was appointed a syndic of an insolvent's estate, and who brought a suit in the district court, which, the court held, was not sustainable, as the insolvent could not have sued in his own name.

Now the eleventh section applies to citizens of states, and not residents or citizens of a territory. It is well settled that a citizen of a territory cannot sue in the federal courts of a state, because he cannot, within the meaning of the law, be called a citizen of a state. The above act, therefore, did not apply to the case before the court, unless under the provision that the district court should possess the same jurisdiction as the court of Kentucky.

The chief justice, in giving the opinion of the court, says, that an assignment of an insolvent's effects by operation of law, is within the eleventh section, and that it embraces cases in equity as well as at law. He considers an unsettled account as a chose in action, and that the items of the account may be denominated the contents of a chose in action. This would seem to be reaching after objections against the jurisdiction of the court, and on ground most unsatisfactory to my mind.

A chose in action embraces, in one sense, all rights of action. A judgment is a chose in action, and so is a deed

for land; but these could not have been within the mischief which the statute intended to remedy. It has always seemed to me that the eleventh section was intended to apply to negotiable instruments, as by the assignment of such instruments only could the statute be evaded. The assignment of an instrument not negotiable would only convey an equity, and the remedy in such a case would be, by an action in the name of the assignor. This would be no fraud upon the law, as it could not give jurisdiction to the federal court. Indeed this jurisdiction could only be acquired by an assignment of a negotiable instrument. No other description of paper could be so assigned as to evade the law. An assignment of a mere equity, to give jurisdiction, could easily be exposed and defeated. In his plea or answer the defendant could set up this defence, and the complainant could not avoid it.

An executor or administrator, it has often been held, is not within the law; and that he may sue in the federal court, though the deceased, whose interests he represents, was a citizen, at the time of his decease, of the same state as the defendant. It is difficult to make a distinction between this case and the suit by the syndic. The syndic was an alien, and of course occupied the same ground, in regard to the jurisdiction of the court, as if he had been a citizen of another state. As administrator he could have sued, but could not as syndic. In both cases, by operation of law, he was vested with the interests he represented.

Notes payable to an individual or bearer are not within the statute. Neither is a suit by the indorsee against the indorser. And the right of the holder of a bill to strike out intermediate indorsements in blank, and fill up the indorsement to himself by the payee of the bill, is well established. Now here may be an evasion of the act, and it would be very difficult if not impossible to detect it.

Where a judgment of a state court between citizens of different states, had been assigned to a citizen of the same state with the original plaintiff, it was held that the assignee may sue in the circuit court, although the note on which the judgment was obtained in the state court could not have been sued on in the federal court. 2 Mason, 252. A conveyance of land is not a chose in action. 2 Sum. 257.

This suit is on a mortgage, which is a deed subject to all the laws which relate to conveyances. It must be recorded, &c. as other titles to real estate are required to be recorded. And this is notice to all subsequent purchasers.

The mortgagee has a conditional estate in fee simple. After condition broken, ejectment may be maintained on a mortgage. 2 Mason's Reports, 539. The assignee of a mortgage may bring an ejectment, and it is supposed that no one could doubt his right to sue in the federal court, without regard to the place of assignment. He claims by deed, and he claims the possession of real estate. A bill of foreclosure acts equally upon the deed and the land, as the action of ejectment.

Suppose a deed purporting to convey a legal estate, by reason of some defect of title in the grantor or form of the deed, conveys only an equity. Could not the grantee or assignee sue in the circuit court of the United States? And yet if the deed conveyed only an equity, that equity could not be asserted by the grantor or assignor in the federal court. The transfer or conveyance in such a case is not within the statute. The mischief to be guarded against, is not found in such a transaction. And yet this is a chose in action, for every possible right on which an action may be maintained may be so denominated.

The statute, then, does not reach every transfer of a right on which an action may be brought. And if the statute mean less than this, what limit shall be imposed on its

meaning. The only just limit must arise from the nature of the provision, and the subject on which it acts. That the statute acts upon negotiable paper is clear, but that it acts beyond this is difficult to maintain. That it does not act on conveyances of real estate, either equitably or legally, would seem to be undoubted.

The mortgage was executed to Shoenberger, and he conveyed the premises to the Bank of the United States. Now if this conveyance had been unconditional, there could be no doubt that the Bank or its assignee could sue in this court. But does the condition annexed to the estate affect the jurisdiction of this court. It is not less a conveyance of the estate with the condition than without it, except that on the performance of the condition, the estate may be defeated.

I do not look into the New York reports to ascertain the nature of the mortgagee's interest. In so far as the courts of that state differ in this respect from the English rule and the decisions of the federal courts, they are not to be regarded. The mortgagee, at law, has the legal estate, after default in payment; and by a foreclosure of the mortgage, the estate becomes absolute. That by the modern practice there is rarely a strict foreclosure, does not affect the question under consideration. A sale of the land is generally decreed, if the money be not paid within the time limited. But the title of the mortgagor is foreclosed under the decree, and the sale is directed from equitable considerations.

The bill of foreclosure acts upon the land as fully as an action of ejectment brought to recover possession of it. And this being the case, the transfer of title is not within the 11th section. Upon the whole, we think the court have jurisdiction in this case, in the form brought; and that this view does not conflict with any decision made. The court will decree the foreclosure as prayed, and direct the property to be sold, &c.

MILNE & Co. v. HUBER ET AL.

An act, in so far as it is repugnant to a prior act, repeals it.

But the repeal of the last act, does not give vitality to the first act.

An express statute declares the repeal of the repealing act, shall not give force to the act repealed.

And this statute applies equally to repealed acts, whether repealed expressly or by a subsequent and repugnant act.

A contract growing out of an illegal transaction, or which is connected therewith, cannot be enforced.

The repeal of a prohibitory act does not make valid contracts entered into against law.

But the legislature may give a remedy on a contract founded on a valuable consideration, where no remedy exists.

It may not only remove the prohibition, but where justice and good conscience require, suit may be authorised.

Such a law does not impair the obligation of the contract—is not an *ex post facto* law, nor does it in any respect conflict with the federal constitution.

That such a law is special is no more objectionable than every special law which gives corporate powers to an association of individuals.

In an action of *tort*, a recovery may be had against a part of the defendants.

But in an action *ex contractu*, the recovery must be against all or none.

Messrs. *Chase* and *Miner* appeared for the plaintiffs.

Messrs. *Fox* and *Schenck*, for the defendants.

OPINION OF THE COURT.

THIS action is brought under the statute against the defendants as stockholders of the Washington Library Association, which was engaged in unlawful banking. Four thousand dollars of the notes for circulation, issued by said institution, and held as collateral security for the payment of three thousand dollars, were given in evidence. Also the following bill of Exchange, “\$3000.00. Gentlemen, Cincinnati, August 5th, 1840. Sixty days after date pay to the order of E. L. Jones, cashier, three thousand dollars, and charge to account of your ob’t ser’t. John

Phillips. Directed to Messrs. Sylvester & Co. Indorsed, E. L. Jones, cashier, G. J. Slocum."

By the 9th section of the act to prohibit the issuing and circulating of unauthorised bank paper, passed 27th January, 1816, it is declared, "that all bonds, bills, notes, or written contracts, given to an unauthorised bank, or given to any person or persons, for the use of such bank, &c. shall be void," &c.

The 10th section provides, "that every stockholder, shareholder, or partner, hereafter interested in any such bank, shall be jointly and severally answerable, in their individual capacity, for the whole amount of the bonds, bills, notes and contracts of such bank," &c.

The 12th section authorises suit and judgment against any part or the whole of the persons interested in the bank.

By the 23d section of the act of 28th January, 1824, it is provided, "that no action shall be brought upon any notes or bills, hereafter issued by any bank, banker, or bankers, intended for circulation, or upon any note, &c. made payable to the bank, unless such bank, &c. shall be incorporated, &c. but that all such notes shall be held and taken in all courts as absolutely void."

The 8th sec. of the act of the 23d of March, 1840, repeals so much of the above section, "as prohibits actions to be brought upon any notes or bills, issued after the passage of said act, by any bank, &c. unless it shall be incorporated, &c., and which declares that such notes shall be void."

So far as the act of 1824 was repugnant to that of 1816, it was repealed. The repugnancy consists in the latter act taking away the right of action given against the stockholders, &c. by the act of 1816. And the question here arises whether the repeal of the act of 1824 revives that part of the act of 1816 which was repealed by it.

By a general act, passed 14th of February, 1809, it is provided, "that whenever a law shall be repealed, which

repealed a former law, the former law shall not thereby be revived unless specially provided for."

This provision, it is contended, applies only to laws expressly repealed, and not to an appeal by the repugnancy of the latter act. That the repugnancy does not repeal, but suspends the prior act, which is restored to its full vigor on the repeal of the repugnant act. This distinction seems not to be sustained. Whether the repeal be express or by reason of a repugnant act, subsequently passed, cannot be material in regard to this question. If the repealing act be repealed, it cannot, under the statute cited, give life to the act first repealed.

So much of the act of 1824 as prohibited actions on the notes or bills of unauthorised banks, and which declares such notes and bills void, having been repealed by the act of 1840, and such repeal not having given vitality to such parts of the act of 1816 which were repugnant to the act of 1824, we must construe the act of 1816 as it now stands.

In this view, sections 11, 12, 13 and 14, of the act of 1816, which regulate suits against the stockholders of an unincorporated bank by the bill-holders, are repealed; and we are to inquire whether, under other sections of the act, the bill-holders, or the holder of the bill of exchange, set out in the declaration, can maintain an action.

There is no express prohibition of an action by the bill-holders; but the act inflicts a penalty for issuing such bills, and for receiving or offering them in payment. This makes the whole transaction unlawful, and this is a fatal objection to the action. If the contract arises out of an illegal act, or is connected therewith, there can be no recovery upon it. Looking only to the act of 1816, the bank organization was against law, the issuing of the notes was prohibited under a penalty, and the receiving and offering such bills in payment subjects an individual to a penalty. Now every step taken in the creation and

circulation of these notes or bills, was unlawful, and consequently no action can be brought on them. The act of 1816 was a public act, and the plaintiffs, when they received the bills in question, had notice that they were created and put in circulation in violation of law. The same objection applies to the bill of exchange.

The act of the 23d of March, 1840, repealed the act establishing "the Washington Library Association," and in the second section of the repealing act, enacted "that each and every stockholder in, or member of, said company, is hereby declared to be jointly and individually liable for all bills, notes or other property issued or outstanding against said company; and also for any other liability or debt of said company. And the said company is vested with power to collect and receive such assets and valid claims as it may hold against any individual or company, in order to close up and settle the affairs of said company, but for no other purpose whatever."

The effect of this act is now to be considered.

Whether the legislature had the power to repeal the charter of "the Library Association," is not necessarily involved in this inquiry. Nor can the decision of it, either way, materially affect the question between the parties on the record. But the charter involved private interests, although the power of banking might not have been given, which no act of the legislature could divest. Such interests are as well secured, and on the same principle, as a deed secures to the grantee a title to his land. If there was an abuse of the charter, by which it became liable to forfeiture, the inquiry should have been made, and the forfeiture enforced by a judicial procedure. But, if that part of the act which purports to repeal the charter, be unconstitutional and void, it does in no respect affect the validity of the second section of the act. An act may be void in part and good in part.

Where a contract is made in express violation of law, a repeal of the prohibitory act does not impart validity to the contract. But this principle does not apply to the case under consideration.

The bill of exchange bears date the 5th of August, 1840, and at that time the notes or bills of the bank were received by the plaintiffs. The dates of those bills are not material, as the dates do not show the time they were put into circulation. This transaction took place five months after the act giving a remedy to the creditors of the association, in order to close its business. Now the bill of exchange may have been given to close the concerns of the bank, within the meaning of the act. A large amount of the bills of the institution being in the hands of the plaintiffs, they took the bill of exchange, and retained the notes of the institution as collateral security.

Had the legislature power to make this provision? It will be observed that, in the act of 1816, the organization of the bank and the issuing of the bills were expressly prohibited, and a penalty was annexed for doing any of the prohibited acts; still, in the same law, a remedy was given against the stockholders by the bill-holders. That the prohibitory parts of the act, above referred to, took away all legal remedy against the bank on its bills has been decided; and yet, no one has doubted that the remedy given on these bills in the subsequent sections was effectual. Had these provisions been contained in separate acts, it is not perceived that a different effect could have been given to them. They must have been construed as the act of 1816 was construed. Indeed this is a general principle. All laws on the same subject shall be considered, so far as effect can be given to them, as one law.

The negotiation between the parties before us took place several months after the remedy was given to and

against the bank, and unless the contrary be made to appear, the court will presume that it is within the policy of the act. Such appears to have been its character. The argument that the law only embraced outstanding notes and debts of the company, at the time of its passage, is not sustainable, as the giving of a new note or bill may be as necessary in winding up the business of the bank as the payment, in cash, of an old debt.

At the time the contract was made with the plaintiffs, the disabilities of the bank were removed, and a power was given to it to collect its debts, and all its creditors were authorised to bring suit against it; and the members of the company were declared to be jointly liable. This is placing the bank, for the purpose of closing its business, on the legal ground it would have stood on, had there been no legal inhibition to its organization and business. That this law will operate upon all subsequent transactions, there can be no doubt, and no objection in principle is perceived to giving effect to it on all the open transactions of the bank.

Admit that the mere repeal of a prohibitory law would not give force to a contract made void by such law, yet it does not follow that the legislature may not remove a prohibition, and authorise a recovery, on a valuable consideration. The legislature cannot make contracts for individuals, and they cannot impose an obligation which does not equitably arise out of the transaction. But they may give a remedy where there is none, and where in good conscience there should be one. A remedy being general, applies to previous as well as subsequent cases.

In *Matthewson v. Saterlee*, 2 Peters, 407, speaking of a statute, the court say, "it is said to be retrospective. Be it so; but retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned nor forbidden by any part

of the constitution. The courts in Pennsylvania having decided that the relation of landlord and tenant did not exist under certain titles, the legislature passed a law that such relation should exist under those titles, and the court held the law valid and carried it into effect. The case being removed by a writ of error, from the supreme court of Pennsylvania to the supreme court of the United States, the judgment was affirmed.

The "Washington Library Association," having assumed banking powers, issued its bills, which circulated as bank paper. Every principle of justice would hold the association liable to pay these bills; and by the common law, the holders of the bills could, by an action at law, recover from the association their amount. But the statute declared unauthorised banking unlawful, and consequently no action could be sustained on these bills. But the act of 1840 provides expressly that the holders of these bills may maintain an action on them. And if this can be done, each member of the association is responsible, the same as in an ordinary co-partnership. Every one must pronounce this remedy a just one, and it is clear that it does in no sense conflict with the constitution of the United States.

The same rule applies, and with equal force, in behalf of the bank and against its debtors. We think, therefore, that on this ground the action is sustainable on debts contracted prior to the act of 1840. But, the court, in sustaining this action, need not decide this point. The contract on which this suit is founded was long after the act of 1840, giving this remedy.

The above views were given to the jury, who found for the plaintiffs, against a part of the defendants.

On a subsequent day of the term, a motion in arrest of judgment was made on two grounds.

1. Because it does not appear from the declaration that the plaintiffs are aliens.

2. Because the verdict is against a part only of the defendants.

The plaintiffs, in their declaration, state that they are subjects of the Queen of Great Britain and Ireland. This, we think, is a sufficient averment. If the plaintiffs are subjects, as averred, they are aliens. And the act of 1789 declares, that the circuit court shall have jurisdiction where the matter in dispute exceeds five hundred dollars, "where an alien is a party," &c. An alien means nothing more than a citizen or subject of a foreign state. An alien is defined to be by Bouvier, "one born out of the United States, who has not since been naturalized under the constitution and laws."

As to the second ground, in actions of *tort*, a jury may find a part of the defendants guilty, and the others not guilty. And the same rule may apply in an action founded on a statute, with special provisions to that effect.

It was held in *Govett v. Radnidge*, 3 East, 62, that where the defendants so negligently conducted themselves in the loading, &c., that the hogshead was damaged, the gist of the action was the *tort*, and not the contract out of which it arose; and therefore, that on the plea of not guilty, the two being acquitted, judgment might be had against the third, who was found guilty. This case seems to be brought into doubt, if not overruled, in the case of *Weall v. King*, 12 East, 452. A different decision was given in *Powell v. Layton*, 2 New Rep. 365, and in *Max v. Robert*, *ib.* 454.

In actions *ex contractu* against several, it must appear on the face of the pleadings that their contract was joint, and that fact must be proved on the trial. 1 Chitt. Pl. 50. This is otherwise against a common carrier and executors. If one executor plead *plene administravit*, the plaintiff may recover against the other. 1 Saund. 207, a. b. note.

Where by bankruptcy one of the defendants is discharged,

and he plead it, it will not defeat the action, but the plaintiff may enter a *nolle prosequi* as to him, and go on against the others. But this cannot be done in case of an infant or feme covert. 1 Chitt. Pl. 50.

But if the special counts in the declaration could, under the special provisions of the statute, authorise a recovery against a part of the defendants; yet it is clear that the verdict cannot be sustained under the general count. This count is for money had and received, consequently the proof and finding of the jury must correspond with the joint liability set out in this count.

The jury have found generally only against a part of the defendants, and on such a finding the judgment cannot be entered, but must be arrested. In Bac. Ab. title, Verdict L., it is said, "if part of the issue which is sensible, be insufficient in law, and the verdict be a general one, it is bad; for the court cannot in such case but intend that part of the damages were given for a matter insufficient in law."

After the business of the court was closed, but, before the minutes were signed, an application was made to the judges, out of court, and a brief furnished, to amend the verdict, so as to apply to the good counts; but the motion being made too late, was not taken up and considered.

Ex parte John T. Balch.

EX PARTE JOHN T. BALCH.

The pendency of a suit between the same parties, and respecting the same subject matter, in another state, may be pleaded in abatement in the courts of the United States.

But to make such plea effectual, it must show that the court where the suit is pending has jurisdiction.

Certain things are required to give jurisdiction to a proceeding in bankruptcy, and all these must appear in the plea.

Mr. *Wright*, appeared for the plaintiff.

Mr. *Fox*, for the defendant.

OPINION OF THE COURT.

THE following point has been certified by the district court, sitting in bankruptcy, to this court, viz: "Whether the facts set forth in the plea of the said John T. Balch, if true, constitute a bar to the proceedings in this cause."

Benjamin A. Munford v. John T. Balch. The plea states, that heretofore, and before the said petitioner exhibited his petition, in this honorable court, to wit, on the 31st day of October, 1842, the said petitioner, one of the late firm of Churchill & Co., in behalf of himself and late partner, William Churchill, and one John W. Harris, filed their petition in the district court of the United States for the southern district of New York, against the defendant, setting forth, among other things, that this defendant owed to them a sum greater than five hundred dollars, the consideration being for merchandise bought; and which this defendant avers is the same note as set forth in the present petition of the said Munford; and setting forth also that this defendant, on or about the 29th of January last preceding the filing of the petition, then being a merchant

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in the city of New York, made and executed an assignment and conveyance in contemplation of bankruptcy, secured and preferred certain creditors of this defendant, a preference over the general creditors of this defendant, and that said assignment was made to John E. Mitchell and John Hudson, of the city of New York; and that this defendant, in the spring of 1842, departed from the state of New York with intent to defraud his creditors, and to avoid being arrested; and they prayed that he might be declared a bankrupt, pursuant to the act of Congress, which petition was for the like matter, relief, and purpose, as the present petition. The assignees filed their exceptions, and upon argument the cause was referred to a commissioner of bankruptcy, on the 13th of December, 1842; that the petition was depending the 11th of January, 1843; that it was discontinued the 28th of April, 1843; and this is pleaded in abatement to the present petition.

The pendency of another suit between the same parties, and involving the same matters, may be pleaded in abatement to a new suit. But, to make such plea effectual, it must be shown that the court had jurisdiction of the case.

The proceeding in New York by the creditors of the said Balch, was, to subject him to involuntary bankruptcy, under the first section of the bankrupt act. The act declares, "that all persons, being merchants, or using the trade of merchandise, all retailers of merchandise, &c. owing debts to the amount of not less than two thousand dollars, shall be liable to become bankrupts, within the true intent and meaning of the act, and may, upon the petition of one or more of their creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars, to the appropriate court, be so declared accordingly, in the following cases, to wit: whenever such person, being a merchant, or using the trade of merchandise, or being a retailer of merchandise, &c. shall depart

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from the state of which he is an inhabitant, with intent to defraud his creditors, &c.

Several things are necessary to subject a man to this proceeding.

1. He must be a merchant.
2. He must have left the state with a view to defraud his creditors, or done some other act named in the statute.
3. The petitioners against him must have a claim on him of a sum amounting to five hundred dollars.
4. He must owe debts to the amount of not less than two thousand dollars.

These four things must be shown in the petition, to give the court jurisdiction.

From the plea, it appears that the said Balch was a merchant; that he committed an act of bankruptcy by leaving the state to defraud his creditors; and that the petitioners against him had a demand on him exceeding five hundred dollars; but, it does not appear that he owed an amount of not less than two thousand dollars. This is essential to the jurisdiction of the court, and without it the proceedings in New York were of no validity.

The plea is taken as true, and it must show jurisdiction in the court, whose proceedings are set up in abatement; and having failed to do this, the demurrer to the plea should have been sustained. This may be certified to the district court.

THE UNITED STATES v. TROAX.

An accomplice is a competent witness.

Unless corroborated in his testimony, a jury will rarely on his evidence alone convict.

He appears as a witness under the most unfavorable circumstances.

When other witnesses establish some material facts, sworn to by an accomplice, the jury will give credit to his other statements.

The manner of his relation, the circumstances under which he acted, are to be considered by the jury, in weighing his evidence.

The district attorney appeared for the United States.

Mr. *Swayne*, for the defendant.

OPINION OF THE COURT.

THIS is an indictment for stealing a letter from the mail, containing money. The principal witness against the defendant was the carrier of the mail, who admitted that he was an accomplice, and received a part of the money taken from the letter. The carrier of the mail, it being a horse mail, being young and inexperienced, was influenced, as he stated, to participate in the act, through the persuasion of the defendant.

The court instructed the jury that an accomplice is a competent witness, and that the jury must judge of his credibility. Such a witness always comes before the court and jury under the most unfavorable circumstances. By his own admission, he participated in the offence which he charges and is called to establish against the defendant. And this charge is made by him generally, if not always, under a hope that by making it he may escape punishment. Such a motive is supposed to influence the witness so strongly, as to take from his statements the credit which they might otherwise be entitled to. And in addition to

this, the fact of having committed the same offence, goes to impeach his credibility. From these considerations, a conviction is rarely founded alone upon the testimony of an accomplice.

But if an accomplice be corroborated in some material circumstances, a jury will the more readily believe his other statements. The corroboration must be of some material part of his relation. That which goes to prove directly or indirectly the offence charged, and not an immaterial fact. An accomplice may impress the jury with more or less respect, from his appearance and the manner of his relation. If, from the circumstance of his youth and inexperience, and the superior capacity and experience of the defendant, it is probable that the witness has been unduly influenced by the defendant, the greater credit will be given to the witness. This remark is made with reference to the present case.

The principal witness in this case is corroborated in several important particulars. There is no doubt that the offence charged was committed. And it does appear, from the facts proved, that the defendant might have committed the act as charged. And beyond this, from the conduct of the defendant, his conversations at different times, and with different persons; and especially his great anxiety to induce the witness to leave the state, and his acts in reference to this object, go to create a probability that he had some agency in violating the mail. Circumstances are proved which, if they do not establish the defendant's guilt, independently of the statement of the accomplice, create a strong ground of suspicion against him. And these circumstances remain unexplained. Upon the whole, gentlemen, you must bring your minds to a conclusion in this, as in other cases, as to the guilt or innocence of the defendant. Before you convict, you must be satisfied of his guilt, beyond a reasonable doubt. Not that you are to acquit on

Palmer v. Commissioners of Cuyahoga County.

the ground that he may possibly be innocent; for a jury in such a case cannot act upon possibilities. If you believe him guilty, you will say so. The jury found a verdict of guilty, and the defendant was sentenced to the penitentiary.

PALMER v. COMMISSIONERS OF CUYAHOGA COUNTY.

The provision in the ordinance of 1787, that certain navigable waters "shall be common highways and forever free," &c., does not prevent the improvement of the navigation of said waters by a state. The ordinance referred to these waters in their natural state.

If they shall be improved by slackwater navigation or otherwise, a reasonable toll for the increased facility, would not violate the ordinance.

No State can obstruct a navigable stream which extends to other states, or is connected with a river or lake which falls into the sea.

The power to regulate commerce among the several states is paramount, in the federal government, and cannot be restricted by a state.

It might be difficult to state, in this respect, the difference between the general power of a state not subject to the ordinance, and one that is subject to it.

The Connecticut Reserve, ceded to the United States after the adoption of the ordinance, is subject to that instrument equally, as other parts of the territory north-west of the Ohio.

Mr. ——— appeared for the plaintiff.

Mr. *Foote*, for the defendants.

OPINION OF THE COURT.

THIS is an application for an injunction to prevent the construction of a draw-bridge over the Cuyahoga river, by the defendants, on the ground that it will obstruct the navigation of the river, and will be injurious to the real property of the complainant in the vicinity of the bridge.

This application is made under the fourth article of the compact in the ordinance of 1787, which declares, "that

the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states, that may be admitted into the confederacy, without any tax, impost or duty therefor."

As this provision of the ordinance was somewhat elaborately considered, in the case of *Spooner v. McConnell, et al.*, 1 McLean's Rep. 337, it will not be necessary now to discuss the subject at large.

The ordinance had reference to "navigable waters" in their natural state. No tax, impost or duty shall be imposed for their use; and as they are to remain "common highways," there can be no obstruction to their use.

Now this provision does not prevent a state from improving the navigableness of these waters, by removing obstructions, or by dams and locks so increasing the depth of the water as to extend the line of navigation. Nor does the ordinance prohibit the construction of any work on the river, which the state may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass, with little or no delay, and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the ordinance.

A state, by virtue of its sovereignty may exercise certain rights over its navigable waters, subject, however, to the paramount power in Congress to regulate commerce among the several states. These powers are not concurrent, but are separate, and independent of each other. And in regard to the exercise of this power by a state, there is no other limit than the boundaries of the federal power.

It would be difficult to maintain the power in any state to obstruct any of its navigable waters which extend

through other states, or are connected with the sea, or with waters falling into the sea. And it might be more curious than useful to inquire in what the powers of the States generally differ, in this respect, from the powers of the states bound by the ordinance.

A toll charged for the improvement of the navigation of a river, is not within the ordinance. In such a case the tax would not be, for the use of the river in its natural state, but for the increased commercial facilities. A draw-bridge across a navigable water is not an obstruction. As this would not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw; and as such a work may be very important in a general intercourse of the community, no doubt is entertained as to the power of the state to make the bridge. It is one of those general powers possessed by a state for the public convenience, and may be exercised, provided it does not infringe on the federal powers, or violate the limitations in the ordinance.

In the argument, the defendants' counsel insist that the Cuyahoga river being within "that territory called the Western Reserve of Connecticut, and which was excepted by the state of Connecticut, out of the cession made by it to the United States, in 1786, is not subject to the ordinance. That neither the right of soil or jurisdiction in the Reserve was ever vested in the United States, until the deed of cession by Connecticut to the United States, which was long after the date of the ordinance."

That this Reserve was, to some extent, subject to the legislation of Connecticut, for several years after the date of the ordinance, is admitted. But, when this territory and the jurisdiction over it were ceded to the United States, it became subject to the ordinance, the same as every other part of the north-western territory. Rights

Wright, Assignee of Foster v. Rogers.

acquired under the former laws are governed by those laws. But on its cession to the union, all the laws of the territory, and especially its fundamental law, became the law of the Reserve. By consenting to come under the jurisdiction of the federal government, they became parties to the articles of compact contained in the ordinance. The injunction is refused.

WRIGHT, ASSIGNEE OF FOSTER, v. ROGERS.

A set off must be in the same right.

A witness may be competent to prove some facts, and incompetent to prove others.

The bankrupt is a competent witness where his assignee is a party, as he can have no legal interest in the decision of the case.

Mr. *Wright*, appeared for the plaintiff.

Mr. *Jones*, for the defendant.

OPINION OF THE COURT.

This action is brought by an assignee in bankruptcy, to recover a sum admitted to be due. Foster & Brothers having been once in business, and the defendant having an account against them exceeding one hundred dollars, the defendant offered to prove it, as a set off. But the court held that it could not be so received, as it was not a debt in the same right. That it might be received if Foster the plaintiff had expressly assumed to pay it; but no such evidence being offered, the account was rejected.

Charles Foster, a brother of the bankrupt, who formerly was a partner in the house of Foster & Brothers, was

Raverty and Wife v. Fridge et al.

offered as a witness. He was objected to, on the ground of interest. The court held that he was a competent witness generally; that he would not be permitted to speak of facts, in which his own interests were involved.

William R. Foster, the bankrupt, was admitted as a witness, though objected to. He has no interest in this suit, as his liability can neither be increased nor lessened by any decision in the case.

The jury found for the plaintiff. Judgment.

RAVERTY AND WIFE v. FRIDGE ET AL.

All the substantial requisites of the statute must be complied with, in taking a relinquishment of dower.

The legislature may remedy a mere formal defect of deeds previously executed. Dower is often claimed under circumstances of great injustice.

Mr. Fox, for the plaintiffs.

Messrs. Storer & Riddle, for defendants.

OPINION OF THE COURT.

THE question in this case is, whether a deed has been duly acknowledged by the wife of Raverty? Two objections are made to the validity of the acknowledgment.

1. That there was no separate examination.

2. That it does not appear that the contents of the deed were made known to the wife, as the statute requires.

On looking at the acknowledgment, we think it does sufficiently appear that there was a separate examination.

As regards the second point, it was held in *Connell v.*

Corness, 6 Ohio Rep. 142, that to bar the dower of the wife by a deed executed under the act of 1805, it is necessary that the certificate of acknowledgment should show the wife was made acquainted with its contents.

In consequence of that decision, it is supposed the act of the 9th of March, 1835, was passed, which provided, "that any deed, mortgage, or other instrument of writing, heretofore executed in pursuance of law, by husband and wife," shall convey dower, although the magistrate "shall not have certified that he read or made known the contents of such deed," &c.

The act of the 1st of May, 1818, also required, "that the deed should be read, or the contents thereof be made known to the wife." In *Brown v. Farran*, 3 Ohio Rep. 142, it was decided that every essential requisite must appear in the certificate, or be fairly inferrible from it; and that a defect cannot be supplied by parol proof.

It does not appear from the certificate of the officer that in taking the acknowledgment of Mrs. Raverty he made known to her the contents of the deed, and the question is, whether the act of 1835 cures such defect?

It is the province of a state legislature to regulate the conveyance of real estate. The form and effect of the conveyance it may determine; and the only objection to the above act is, that it has a retrospective effect. It is clear, that the act of 1835 does not impair the contract, and it is not, therefore, in conflict with the constitution of the Union. It gives effect to the intention of the parties, by relieving from a mere informality, which, under the decision of the supreme court of Ohio, reported in 6 Ohio Rep. was fatal to the validity of the acknowledgment. The act then, instead of impairing the deed, gave effect to it, as the parties intended. The act was remedial, and in violation of no constitutional right.

All experience shows that claims of dower, for informality in the acknowledgment, are often made under circumstances of great injustice:

After the husband has received the full value for the land, the sale of which was equally beneficial to the wife, yet dower is claimed after the death of the husband, not on any ground of merit, but merely because the certifying officer who took the acknowledgment, either from ignorance or inattention, omitted to state that the contents of the deed were made known to her; or for some other equally unimportant matter. If there has been fraud or imposition on the wife, in the relinquishment of her dower, the courts should be open to her whenever she may chuse to apply for redress. But where she consented to a *bona fide* sale, and went before a magistrate to acknowledge the deed and relinquish her dower, and the magistrate certifies that she duly acknowledged it, relinquishing her dower, it should be held sufficient. In all my experience, I have never known an instance of fraud or imposition on a *feme covert*, in procuring her relinquishment of dower. But, I have known numerous instances where dower has been claimed and recovered, under circumstances that might be characterised as legal swindling.

There is an affected sympathy evinced in such cases, by the legislature and the courts, which I have always thought was misplaced. Such, however, has been the course of decisions on this subject, that no change can be expected, except through the act of the legislature.

The defect of the acknowledgment before us is remedied by the act of 1835.

THE UNITED STATES v. BROWN.

The rules of pleading are the same in civil and criminal cases.

Where the prosecutor states the offence with greater particularity than he is bound to do, the proof must correspond with the averments.

That cannot be regarded as surplusage, which is connected with the offence.

The district attorney appeared for the plaintiff.

Mr. *Stanton* and Mr. *Collier* for the defendant.

OPINION OF THE COURT.

THE defendant, being a post-master, was indicted for stealing a letter from the mail directed to Daniel Kilgore, Cadiz, Ohio, which contained certain bank notes, the property of a person named, of the value of, &c. which letter came into the possession of the defendant as post-master, &c.

On the part of the prosecution witnesses were examined to prove the mailing of the letter, at Columbus, in this state, directed to Cadiz, containing various bank notes, which letter was forwarded in the mail, but was never received. That the defendant was post-master on the route the letter was sent, and within a few miles of Cadiz. Also to prove, that a part of the notes lost were found in possession of the defendant.

The defendant failed to show how he came into the possession of the money, although an attempt was made to do so. He proved a good character, &c.

Certain points being made, the court instructed the jury that the embezzlement of the letter was the gist of the offence, and that the money it contained, which was taken, was an aggravation of the act. That it was not necessary

to describe the notes particularly, or to state whose property they were. But where such description is given, and the property is averred to be in a particular individual, both must be proved as laid.

The rules of pleading are the same in civil as in criminal actions. In *Jerome v. Whitney*, 7 John. 321, the court held that if the plaintiff in his declaration on a note for value received, instead of stating generally that it was given for value received, sets forth specially in what the value received consisted, he is bound to prove the particular value according to the averment, and the general acknowledgment of value in the note is not sufficient to support the declaration. So in the 3d of Day's Rep. 283, it was held, that where in an indictment for stopping the mail, the contract of the carrier of the mail with the post office department, was set out, it must be proved. And where an indictment for burglary in the house of J. D. with intent to steal the goods of J. W. it appearing that J. W. had no property there, it was held material to state truly in whom the property of the goods was.

In Chitty's Pl. 1 vol. 263, it is said, if however the matter unnecessarily stated be wholly foreign and irrelevant to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage. If the prosecutor choose to state the offence with greater particularity than is required by the statute, he will be bound by the statement, and must prove it as laid. *Rex v. Dawlin*, 5 Term. 311. If the averments be mere facts disconnected with the offence, they need not be proved.

Jury found a verdict of not guilty.

McLEAN, ASSIGNEE v. ROCKEY AND OTHERS.

From the time of filing a bankrupt's petition, the right of the bankrupt, by relation, is vested in his assignee.

And no subsequent lien created by the bankrupt, or by a judgment, can be valid.

But a judgment obtained before the petition was filed, having been obtained bona fide, is a lien within the second section of the bankrupt law.

A lease for ninety-nine years, renewable forever, by the common law is only a chattel.

A judgment binds the real estate of the defendant, from the first day of the term at which it was rendered.

Under the construction of the Ohio statute, by the supreme court of the state, a permanent leasehold estate is land, within the execution law, and is bound by a judgment.

All judgments rendered at the same term have equal liens, on the real estate of the defendant, however the executions may have been issued and levied, provided the levy has been within a year from the rendition of the judgment.

Where there is no allegation of fraud in the bill, and the liens will more than absorb the property of the bankrupt, there is no reason why this court should exercise jurisdiction.

Messrs. *Worthington, Brown* and *N. C. McLean* appeared for the complainant, and Messrs. *Storer, Chase* and *Van Metre*, for the defendants.

OPINION OF THE COURT.

On the 8th November, 1842, Coffin filed his petition under the bankrupt law, and on the 3d of February ensuing he obtained a decree of bankruptcy. On the 25th of June, 1839, he procured a leasehold estate of ninety-nine years renewable forever. At October term, 1842, the following judgments were entered against him. In favor of Henry Rockey, for \$199 64; Springer & Whiteman, for \$675 50; Matthias Roosa, for \$712 87. The court commenced its session the 3d of October, and adjourned the 7th of December.

On Roosa's judgment execution was issued the 21st of October, and was levied upon the leasehold premises the 14th of November, 1842. The execution was issued on Rockey's judgment the 22d of October, and on Springer & Whiteman's judgment, execution was levied, as the above levies were made, on the leasehold property the 17th of November.

The Northern Bank of Kentucky, at the same term obtained judgment for \$2049 32, on which an execution was issued within the year, which was levied on the same premises. At January term, 1843, of the superior court of Cincinnati, Marriott & Hardesty obtained a judgment for \$668 72, on which an execution was levied on the leasehold property the 21st of the same month.

As the above levies were all made subsequently to the time the bankrupt filed his bill, his assignee insists, that under the bankrupt law, the leasehold estate is vested in him, and he prays an injunction, &c.

Several questions have been raised and discussed, which will now be considered.

At common law a leasehold is only a chattel interest, and it is contended that it is nothing more under our statute.

The 2d sec. of the act concerning "judgments and executions" (Swan's Stat. 468) declares that "the lands and tenements of the debtor shall be bound for the satisfaction of the judgment against such debtor, from the first day of the term at which judgment shall be rendered." Lands out of the county, and goods and chattels, are bound from the time execution shall be levied.

The October term, at which all the above judgments were rendered, except one, commenced on the third day of October, so that unless the leasehold estate can be considered "lands and tenements" within the statute, and bound by the judgment, there is no lien paramount to the

right of an assignee. By relation, his right to all the estate of the bankrupt, commenced from the filing of the bankrupt's petition.

The bankrupt, from the time his petition is filed, is *civilter mortuus*, "as to all suits at law or equity pending, in which he is a party;" (5 Law Rep. 2d No. p. 71), and that consequently, after that time, no judgment could be recovered against him. That the court will inquire whether in fact the judgment was not entered after the petition was filed; and if so, will treat the judgment, as of no more validity than if entered against a deceased person. So far as regards the disposition of his property, or the control of suits pending against him, the bankrupt, from the time his petition is filed, may be considered as *civiliter mortuus*. But the suits are not abated, and should be prosecuted to judgment, against the bankrupt. 1 Term Rep. 463; 3 Term Rep. 437; 15 East, 622.

Whether the judgments, therefore, were entered before or after the petition was filed, is of no importance. The legislature of the State have an undoubted right to say, as is declared in the above act, that a judgment shall be a lien on lands and tenements from the first day of the term at which it was rendered. The important question is, whether the above leasehold estate was bound by the judgment. That a judgment constitutes a lien on real estate, which is recognized in the second section of the bankrupt law, is undisputed. And there is no allegation in the bill, that either in the causes of action, or in the prosecution of the above suits to judgment, there was fraud. The judgments therefore having been rendered against the bankrupt before his petition was filed, create a valid lien on his real estate. But if the leasehold property be not "lands and tenements," within the statute, there can be no judgment lien.

The act of January 29th, 1821, (Swan's Stat. 289, note)

declared, "that all lands of whatever description, held by permanent leases, shall, in cases of judgments had and executions levied thereon, be considered as real estate; and the officer levying the execution or executions, shall conform to, and be governed by the provisions of the several acts regulating judgments and executions," &c. This act continued in force until the act of the 22d of March, 1837, (Swan's Stat. 289, note), which provided that leasehold estates renewable forever, should descend as estates of inheritance. And that law was repealed by the act of the 5th March, 1839, which contains a similar provision.

The act of 1821 declared, that in case of judgment and an execution levied upon a permanent leasehold estate, it should be considered as real estate; and the officer was bound to conform to the law regulating sales of real estate on execution. Prior to this act, as the supreme court of Ohio say, in the case of *Reynolds' Heirs v. Stark county*, (5 Ohio Rep. 204), that "a lease is personal property. Although the lease contains a stipulation, that it shall be renewable forever; yet any estate short of freehold gives the heir no interest." And it would seem that the act of 1821, in this respect has made no alteration in the law. It only provides that where a judgment has been obtained, and an execution shall be levied on a permanent leasehold estate, it shall be considered as real estate, and sold as such. In other words, such an estate shall be subject to valuation, and must be sold, if improved, for two-thirds of its value. This it is supposed is the extent to which the above act can affect permanent leases.

But the acts of 1837 and of 1839, above cited, provided that a permanent leasehold estate should descend as land. This innovation, it would seem, should not change the nature of such an estate beyond the express words of the statute. It would not subject such an estate to the lien of a judgment. In Kentucky, by an express statute, negroes

descend as real estate, and yet this does not make negroes land. The same quality, at the legislative discretion, may be imparted to any other personal property; but that would not change the nature or legal designation of such property, beyond the words of the statute. It does not make negroes in Kentucky, lands and tenements, any more than the acts of 1837 and 1839 make a leasehold estate, renewable forever, lands and tenements within the statute, subject to a judgment lien.

In the case of *Murdock et al. v. Ratcliff et al.* (7 Ohio Rep. 119) the court say in regard to a lease upon an annual rent, for ninety-nine years, renewable forever, "We know that such interests are usually treated as fees simple by the holders, and that the law requires them to be appraised as real estate in sales under execution; and that by statute they are liable to dower, &c.; but no proposition has been better settled, from the earliest days of the common law, than that a lease, of whatever duration, is but a chattel."

But in *Loring v. Melendy and others*, (11 Ohio, 355), a different view has been taken of this question. The court there held that "permanent leasehold estates, are lands, subject to all the rules and laws which attach to land, for all purposes, and that judgment liens attach to them as lands." And they say that the point thus decided was fairly presented in the case, and "that it was the point upon which the case was reserved." This being the construction of a statute which makes a judgment a lien on lands, &c. it is conclusive of the point. We take as a rule of decision the construction of a statute by the supreme court of the state. The four judgments, first above named, must, therefore, be considered a lien on the leasehold estate in question, from the 3d day of October, 1842, which was the first day of the term.

It is contended, however, that as no execution was issued on the judgment in favor of the Northern Bank of Ken-

tucky, until after execution had been issued and levied, on the judgment in favor of Marriott & Hardesty, entered at January term, 1843, of the superior court, that the lien of the Northern Bank is postponed in favor of the subsequent judgment. This must depend upon the construction of the statute.

The fourth section of the execution law, (Swan's Stat. 470) provides that "when two or more writs of execution against the same debtor, shall be sued out during the term in which judgment was rendered, or within ten days thereafter, and when two or more writs of execution against the same debtor, shall be delivered to the officer on the same day, no preference shall be given to either of such writs," &c. "In all other cases, the execution first delivered to the officer shall be first satisfied." "Provided, nothing herein contained, shall be so construed as to affect any preferable lien, which one or more of the judgments, on which such executions issued, may have on the lands of the judgment debtor." The twelfth section of the same act declares that unless execution shall be taken out and levied within twelve months after its rendition, it shall not operate as a lien on the estate of any debtor, to the prejudice of any other bona fide judgment creditor."

In *Patton v. Sheriff of Pickaway county*, (2 Ohio Rep. 395), *Waymere v. Stayley*, (3 Ohio Rep. 366), *Riddle v. Bryan et al.* (5 Ohio Rep. 52), it is laid down generally that in the above fourth section "the legislature intended to provide for three classes of cases." 1. "Where there are two or more judgment creditors, having equal rights, and where there is no priority of lien, as where judgments are recovered in the same term." 2. "In cases where judgments do not operate as a lien, but the property is bound only from the time when seized in execution, as goods and chattels and lands not situated in the county where the judgment is recovered;" and 3. "For cases where the creditor in conse-

quence of not having an execution levied within one year from the date of his judgment, has lost the benefit of his lien, so far as that it shall not operate to the prejudice of any other bona fide judgment creditor."

From the above cases it appears that a judgment lien remains in full force, if execution be issued and levied within the year, as was done in the case of the Northern Bank.

As there is no allegation of fraud in the bill, and as the judgments will absorb the whole of the leasehold estate, and leave no surplus for the general creditors, there seems to be no reason why this court should take any further jurisdiction in the case. The bill is, therefore, dismissed at the complainant's costs.

HOBSON v. McARTHUR'S HEIRS.

A demurrer to the declaration raises the question of law, whether the plaintiff, from the facts stated, is entitled to recover.

In pleading, it is not necessary to state what is merely matter of evidence.

If a party partially states a deed, which is defective, or contains matter qualifying the part stated, the defendant may crave oyer of the deed, and set forth the whole, and then demur.

Mr. Stanbury, for the plaintiff. *Mr. Vinton*, for defendants.

OPINION OF JUDGE LEAVITT, (JUDGE M LEAN BEING ABSENT.)

THE declaration in this case is in covenant, and a question as to its sufficiency is presented to the court by a special demurrer. Three several causes of demurrer are set forth; but they may all be considered as substantially presenting but one inquiry, namely, whether any cause of

action appears in the declaration, entitling the plaintiff on the face of it, to a recovery in this action.

The declaration sets forth a contract between the plaintiff and D. McArthur, dated the 25th of September, 1830, reciting a previous contract between said parties and one John Hobson, (who subsequently assigned his interest to McArthur,) dated in November, 1810, respecting the withdrawal and re-location of certain land warrants, in which they were jointly interested; and further, that in May, 1830, by an act of Congress, the parties were permitted to relinquish their entries to the United States, and were to be compensated for them, according to a valuation provided for in the act; and also, that the parties having disagreed as to their rights, under the contract of 1810, a suit in chancery was instituted by McArthur against the plaintiff, and an injunction obtained restraining him from receiving any money from the United States, under said act, till a further hearing; that the parties, being desirous that the money appropriated should not remain inactive during the pendency of the chancery suit, agreed that the plaintiff should assign all his interest in the land warrants to McArthur, to enable the latter to obtain the money from the treasury of the United States; the said McArthur paying to plaintiff the sum of eleven thousand five hundred dollars, and retaining the balance in his hands. Here follows a covenant by McArthur, that if in the chancery suit it should be decreed, that the plaintiff, directly or indirectly, should be entitled to any greater proportion of the money, it was to be paid to him, with interest, at the Bank of Chillicothe; and it was stipulated, that this covenant should be held to embrace "any judgment, order or decree, which might produce this result." It is then averred, that the plaintiff performed this part of his covenant, and that the sum of fifty-seven thousand six hundred and eight dollars was received by McArthur from the United States. It is then further

averred, that such proceedings were had in the chancery suit, as that a decree, dismissing the bill, was entered in the supreme court of the United States, at January term, 1842. There is then a further averment, that in virtue of said decree, the plaintiff is entitled to recover of the defendants the sum of three thousand two hundred and one dollars, with interest. The declaration concludes with the usual averment of notice to defendants, and of the non-payment of said sum, at the Bank of Chillicothe.

It is a well established rule in pleading, that on a demurrer, all the facts set forth, in the pleading demurred to, which are properly pleaded, are to be taken as admitted. In deciding on the sufficiency of this declaration, the court is therefore to be governed by what appears on its face, and cannot go into matters that are extrinsic. With this principle in view, we are called upon to say, whether the plaintiff has made out such a case, as will entitle him to a recovery.

The principal inquiry arising on this demurrer, is, whether the plaintiff has shown with sufficient fulness and certainty, that he is entitled to the sum claimed, by the operation of the decree in the chancery proceeding. It is insisted by the counsel for the defendants, that the rights of these parties are not definitively settled by this decree, and that the declaration shows nothing from which the deduction can be made, that the decree establishes a liability on the part of the defendants, to pay the sum claimed, or any any other sum.

The covenant between these parties, as set forth in the declaration, is, substantially, that McArthur shall pay the plaintiff such sum, in addition to the eleven thousand five hundred dollars, as, under the operation of the decree, shall appear to be due to him. It is considered clear, that in the covenant, as set out in the declaration, in which reference

is had to the final disposition of the chancery suit, a decree for money alone was not within their contemplation. It looks to any decree which, in its results, shall show that McArthur is liable to the payment of any further sum to this plaintiff. And it is very clear, that the plaintiff cannot recover, in this action, without proof establishing this liability. But, is not the averment, that, under the decree, the defendants are liable to pay the sum claimed, sufficient, in connection with the other matters set out in the declaration, to show a good cause of action, and put them to their plea, and to an issue of fact? In pleading, it is not necessary to state what is merely matter of evidence. Stephens on Pleas, 388. It was not necessary, therefore, that the plaintiff should set out the facts or process by which the liability of the defendants was to be established under the decree. This would lead to great prolixity, and is a mode of pleading condemned by all writers on that branch of the law. Ibid. 400.

It was contended in the argument on this demurrer, that the contracts set forth in the declaration were to be regarded as before the court for construction; and, that if the court were satisfied, from their examination of the contracts, that the plaintiff has no cause of action, the demurrer must be sustained. This position is no doubt tenable, where the pleader sets out the contract *in hæc verba*. 1 Chitty's Plead. 306, 8th Am. ed. But, where he professes only to set it out in part, or according to its legal effect, the court will not give a construction to the contract, on a demurrer. If a party "partially states a deed, which is defective, or contains matter qualifying the part stated, the defendant may crave oyer of the deed, and set forth the whole, thereby making it a part of the declaration, and then demur, either in respect to the defect in the deed, or the improper manner in which the plaintiff has stated it." Ibid. 665. The defen-

Doe, on demise of Raverty and Wife v. Fridge.

dant has not pursued this course in this case; and, confining our inquiry to the face of the declaration, we can perceive no sufficient ground for declaring it defective.

The demurrer is therefore overruled.

DOE, ON DEMISE OF RAVERTY AND WIFE, v. FRIDGE.

The separate examination of a feme covert, as required by the statute, is indispensable; but the very words of the statute need not be used by the certifying officer.

If, in this respect, the requisites of the statute are substantially complied with, it is sufficient.

OPINION OF THE COURT, BY JUDGE LEAVITT.

THIS is an action of ejectment; and the defendant, as a part of his proof of title to the premises in dispute, relies on a deed executed by Peter Casells and wife, to John F. Keys, acknowledged by the grantors, the 3d day of July, 1818. And it is admitted by the counsel for the plaintiff, that if this deed is a valid conveyance, they have no legal claim to a recovery in this action. This deed is objected to, on the ground, that the certificate of its acknowledgment is defective, as not conforming to the requisitions of the statute of Ohio, passed in January, and which took effect the 3d of May, 1818, and under which, the deed in question was executed and acknowledged. It is insisted, that the certificate does not set forth, with sufficient certainty, that there was a separate acknowledgment of the execution of the deed, by the wife of the grantor, as required by the statute.

The magistrate, in his certificate of acknowledgment,

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after setting forth the appearance of the husband and wife before him, proceeds thus: "the said Clarissa, being examined separately and apart from her husband, and acknowledged the above indenture to be her voluntary act and deed, for the uses and purposes therein mentioned." The statute of 1818, relating to the execution and acknowledgment of deeds, requires that they shall be signed and sealed by the grantors, and be acknowledged before, and attested by, two subscribing witnesses, and shall also be acknowledged before a judge or justice of the peace; and, when the grantors are husband and wife, it is made the duty of the officer, taking the acknowledgment, to examine the wife separate and apart from her husband, and to read, or otherwise make known to her, the contents of the deed; and if, on such examination, she shall declare, that she voluntarily, and by her own free will and accord, and without any fear or coercion from her husband, did and now doth acknowledge the signing and sealing thereof, he is required to certify the same.

It is quite obvious, that this certificate is loosely and unskilfully drawn; but it cannot be regarded as a nullity, if there has been a substantial compliance with the requirements of the statute. In the case of *Brown v. Farran*, 3 Ohio Rep. 140, the certificate of acknowledgment was similar to the one now under consideration. It set forth the examination of the wife, apart from her husband, but did not state, that the wife, on such separate examination, acknowledged the execution of the deed. Nor was it certified, that the wife, on her separate examination, declared that, "she voluntarily and of her own free will and accord, and without any fear or coercion of her husband," signed, sealed, and acknowledged the deed; but the court held, that the presumption of undue influence on the part of the husband, was fairly excluded, by the facts set out in the certificate, and that it showed a substantial compliance

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with the statute. In the case referred to, the court say, "If the certificate contain the substance of the law, it is sufficient;" and it is added: "it evidently appears from the certificate on this deed, that the wife was examined apart from her husband, that she acknowledged the deed, and admitted it to be voluntary on her part." The cases in 7 Ohio Rep. 353, and 8 Ohio Rep. 120, are confirmatory of the decision in *Brown v. Farran*. And, in conformity with these cases, the principles of which are in entire accordance with the views of this court, we hold the certificate before us, to be substantially in compliance with the statute. Although it does not state explicitly that the wife acknowledged the signing and sealing of the deed, on her separate examination, and that such signing and sealing, was without any undue influence on the part of her husband; yet, as it does appear, that she was examined apart from her husband, the court may well presume, in the absence of any facts warranting a contrary inference, that the examination was conducted in accordance with the provisions of the statute. To use the language of the court, in the case in 8 Ohio Rep., before referred to, "the certificate admits of no sensible interpretation except that which shows the essential requisites of the law were complied with."

The objection to the certificate of acknowledgment, based on its omission to set out, that the contents of the deed were made known to the wife, which was expressly required by the act of 1818, is obviated by the act of March 9, 1835. (Swan's Stat. p. 269.) It was the object of this statute to give validity to deeds previously executed, in the certificate of the acknowledgment of which the defect first stated should occur.

The deed in question being sustained, judgment must be entered for the defendant.

PETERSON & PETERSON v. WOODEN.

If the patentee claims more than he has invented, his patent is not void, as under the former law; but, so far as his invention goes, he is protected.

But where the claim is for an improvement of a machine, the patentee must show in what the improvement consists.

In a declaration, the improvement must be stated as an essential part of the plaintiff's right; and if this be not done the declaration is demurrable.

Mr. Storer, appeared for the plaintiffs.

Mr. Fox, for the defendants.

OPINION OF THE COURT.

THIS is an action for the violation of a patent right. In their declaration, the plaintiffs state, that they have invented a "new and useful improvement in the cooking stove," which improvement, they state, has not been known or used. The schedule which is set out in the declaration, describes the structure of the stove in all its parts, but nowhere describes in what the improvement consists. And on that ground the defendants demurred to the declaration.

Prior to the act of the 4th of July, 1836, if the patentee claimed more than he had invented, his patent was void. But, under the decision of the supreme court, he was permitted to surrender his patent and take out a corrected one. The 13th section of the above act provides, that "where a patent is invalid by a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had invented, if done through inadvertence, on surrendering the patent, the patentee may obtain a new patent for the

residue of the period unexpired of the original patent." And in all cases of infringement subsequent to the date of the amended patent, it is declared to be valid. The fifteenth section of the same act provides, that, under the general issue and notice, the defendant may controvert the truth of the specifications.

The ninth section of the act of 3d March, 1837, provides, that, where the patentee has claimed more than he has invented, "the patent shall still be deemed good and valid for so much of the invention as shall be truly and *bona fide* his own, provided it shall be a material and substantial part of the thing patented, and be definitely distinguishable from the other parts so claimed without right as aforesaid."

Now although the patent is not void when the patentee claims more than he has invented, yet, in his specification, he must state in what his improvement consists. He does not claim, in this case, the invention of a cooking stove, but an improvement on such stove; but in no part of the declaration is it stated what this improvement is. Had he claimed the invention of the stove, under the above statute of 1837, the invention would have been good, so far as it extended.

This is an essential part of the plaintiff's case, and should be set out in the declaration. And as this has not been done, the declaration is demurrable.

Leave is given to the plaintiffs to amend their declaration.

BEFORE JUDGE MCLEAN, AT CHAMBERS ON THE 31ST OF OCTOBER,
1843.

BROOKS AND MORRIS v. BICKNELL AND JENKINS.

An answer to an injunction bill, though filed without a rule, will be treated as an answer; on a motion to grant, or continue, an injunction.

Affidavits may be read, on both sides, as to facts unconnected with the title.

If a patentee be dead, his administrator may renew the patent.

The Board on whose judgment a renewal is granted, may be said to act judicially. Their judgment is not conclusive as to the right; but of certain facts, it must be considered conclusive.

The specifications of an improvement of a machine, must be so clear as to enable a person acquainted with the structure of such a machine, to build one.

In such description it is sufficient to refer generally to the machine improved, without giving a particular description of it.

It is not material, in the description, to say, whether certain parts of the machine should be made of wood or metal.

Where witnesses differ on the fact of an infringement, the matter should be submitted to a jury, either by an action at law, or an issue directed by chancery.

A difference in form, or proportions only, makes no difference in the principles of the machines. If they operate on the same principle, in the application of the power, in law, the machines are considered identical.

A patent is invalid, if the thing claimed to have been invented, has been made in a foreign country, or described in some public work. But in this, as on the fact of infringement, the machine, or thing invented, must in principle, be the same.

The assignee of a patent right, in part, can, in law, or equity, sustain a suit, for a violation of the patent, without uniting the name of the patentee.

Wright, Coffin and Miner for complainants.

Walker for defendants.

OPINION OF THE COURT.

THE complainants represent in their bill, that on or about the 4th of December, 1828, William Woodworth, now deceased, was the inventor of a certain improvement, or machine, for planing, grooving, and tongueing boards, and

other materials, and for which, having complied with every legal requisite, he obtained a patent, dated the 27th of December, 1828, to him, his heirs, executors, administrators, or assigns, for the term of fourteen years. That the patent, after the 15th day of December, 1836, was duly recorded anew, in the patent office, as required by law. That the patentee having departed this life on the 14th day of February, 1839, letters of administration were granted on his estate, by the surrogate of the county of New-York, to William W. Woodworth. That afterwards he presented to the proper department of the government, a petition for an extension of the patent, and having in all things complied with the law, on the 16th day of November, 1842, a renewal and extension of the patent, for seven years, were granted. That during the original patent, the patentee assigned one half of his interest in the same, to James Strong, and afterwards, on the 29th day of July, 1830, Strong and Woodworth, by deed, transferred to Isaac Collins and Barzillai C. Smith, all their right under the patent, in the state of Ohio, and other territory therein named; and on the 12th day of April, 1831, Collins and Smith conveyed to Lewis Sanders the exclusive right to make, construct, use, and vend, one hundred machines, above patented, for the county of Hamilton, Ohio, as well as other territory. That said Sanders, on the 18th of August, 1831, transferred to Thomas D. Carneal and Charles Neave, one equal undivided half of his right. That Carneal and Neave, on the 9th of July, 1834, transferred all their interest in the patent to the complainants; and on the same day Sanders conveyed to them all his interest. That all the above assignments have been duly recorded in the patent office, except the assignment to Sanders, which has been lost, or mislaid. That on the 2d of January, 1843, Collins and Smith transferred to William W. Woodworth their interest in the

renewal of the patent, which has been duly recorded. That Woodworth, while in possession of the right, on the 2d of January, 1843, executed a certain instrument of disclaimer, as to the exclusive right, or interest, in circular saws for reducing floor planks, or other materials, to the same width, which was also recorded. That afterwards Woodworth assigned his interest in the renewed patent, for the county of Hamilton and other territory specified, to Wilson, and Wilson assigned the same to the complainants, which assignments are of record. That the complainants have been in the use of their right, which was well known to the defendants, but that in disregard of such right, defendants are making, or causing to be made, setting up, and about to put in operation, in the city of Cincinnati, one or more machines, for planing boards and other materials, or have made, set up, and put in operation, such machines, in said city; which machines, and all the material parts thereof, are substantially like, and upon the plan of Woodworth's. And they represent that defendants have little or no property, and in a pecuniary point of view are wholly irresponsible. An injunction is therefore prayed, &c.

The answer admits the emanation of the patent, the death of the patentee, the appointment of administrator, the several assignments, with some exceptions, and the disclaimer of the administrator—denies that the defendants are not pecuniarily responsible—admits the possession and use, under the patent, of a certain machine, but denies that it is the machine patented, and points out six substantial differences—denies that the invention was Woodworth's, and points out similar machines, used and patented before—denies the validity of the patent, on account of defects in the specifications, and points out seven—denies the validity of the renewal to the administrator—admits the construc-

tion of a machine, by the defendants, and gives specifications and drawings; but denies that it is an infringement, and points out what is claimed as new.

On the hearing plaintiffs insisted, that the answer was nothing more than an affidavit, until time for answering expired; and cited 1 Cond. Eng. Chanc. R., 66; 1 Smith's Chanc. Prac. 595.

Defendants objected to the reading of affidavits. Plaintiffs cited 3 P. Wms., 255; 3 Merivale, 622; 1 Vesey, 427; 1 Baldwin, 206.

As to the practice in granting injunctions, plaintiffs insisted, that though there might be doubts about the validity of the patent, if there had been an exclusive use for a length of time, the injunction would be granted. 6 Vesey, 707; Phillips on Patents, 461; 4 Wash. 534; 9 John. 470; 3 Merivale, 622; 1 Mad. Chanc. Prac. 113; 14 Vesey, 131. Defendants admitted this to be the law; but denied any use of the machine patented, insisting that it was substantially different.

Defendants for the present admitted plaintiffs' title as set out: but opposed the injunction on three grounds:

1. The patent is invalid for defects in the specifications; there are no written references to drawings, as required by law; and the description is too general and ambiguous to enable a practical machinist to construct a machine. 2 McLean's R. 37. This question is a matter for the court. 2 Brock. 298. But the affidavits of men of skill may assist.

2. The administrator cannot renew, but only the patentee. Act of 1836, sec. 18. Where the right is to extend to representatives and assigns, it is specially provided for, as in sections 5, 10, 13, and the latter part of 18. The design is to reward the inventor, and not speculators. Plaintiffs cited *Van Hook v. Scudder et al.*, (reported in New York Herald of June 20, 1843); and also claimed that the opinion of the board was entitled to weight.

3. There was no infringement. Plaintiffs claimed a particular application, or combination, of known principles. Defendants had made a different one—cited 1 Peters' C. C. R. 398; 4 Wash. 706; 2 Kent, 370; 7 Wheat. 361, to show what amounts to an infringement.

Two preliminary points are made, which it may be proper to settle, before the main questions are considered.

1. The effect of the answer. As it has been voluntarily and prematurely filed, it is contended, it can have no other effect than the affidavit of the defendants, in regard to the motion now made. It is true there has been no rule for answer, but this seems to be no satisfactory reason why it should not be treated as an answer. The complainants call upon the defendants to answer, and, on many points, the answer is responsive to the bill.

By the fortieth rule of practice, "a defendant is not bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto." And the same rule declares, that if "a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent."

From this rule it is clear that the defendant is in no default, by refusing to answer any part of the bill to which he is not specially interrogated. And if he expresses "ignorance of the matter, his answer shall be deemed impertinent;" but the rule does not say that if the answer respond to the charges in the bill, it shall be held impertinent.

By the fifth section of the act of the 2d of March, 1793, it is declared, that "no writ of injunction shall be granted in any case, without reasonable previous notice to the adverse party, or his attorney, of the time of moving for the same." And by the fifty-fifth rule it is declared, that "special injunctions shall be grantable only upon due notice to the other party, by the Court in term, or by a judge thereof

in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered."

Both from the statute, and the rule of practice, it is clear, a hearing of both parties is contemplated on an application for an injunction. And there can be no objection, it would seem to me, if time be given, to an answer of the allegations in the bill.

2. An objection is made to the affidavits offered in support of the bill, and in contradiction of the answer. That affidavits are read to support the injunction, on a motion to dissolve it, on the coming in of the answer, is a well established rule in England. *Gibbs v. Cole*, 3 P. Wms. 255; 2 Eq. Cases Ab. 14 pl. 2; *Isaacs v. Hampage*, 3 Bro. Ch. 463; 1 Ves. jr. 427. In *Morphet v. Jones*, 19 Ves. 350, it is said, "there are many cases of injunction where you may reply to the answer by affidavits, not on the question of title, but on mere facts, as in the instance of waste, on such questions of fact though not on the title, affidavits in reply to the answer may be read."

It is said, in 1 Smith's Ch. Pr. 595, that "if the plaintiff, instead of applying for the injunction upon affidavit, waits until the defendant has answered, he must rest his case upon the disclosures made by the answer, and he is not entitled, either for the purpose of obtaining or continuing an injunction, to read any affidavits in support of his motion, in opposition to the answer." But cases of waste, or of mischief analagous to waste, are an exception to this rule, where the affidavits do not refer to title.

The illegality of the extension of the patent, is the principal ground of objection to the complainants' right.

The eighteenth section of the patent law of July the 4th, 1836, provides, "that whenever any patentee of an invention or discovery, shall desire an extension of his patent, he may make application therefor, in writing, to the commis-

sioner of the patent office," &c. The secretary of state, the commissioner of the patent office, and the solicitor of the treasury, constitute a board to determine on the right of the applicant to an extension ; and if their judgment shall be in his favor, the patent is extended seven years beyond the original grant of fourteen years.

This privilege, or right, it is contended, is given to the patentee, and to no other person. And that as the above extension was granted, after the decease of the patentee, and to his administrator, it was unauthorised, and is consequently void.

To William W. Woodworth, the administrator of the patentee, Collins and Smith, on the 2d of January, 1843, transferred all their interest in the renewal of the patent. So that in fact when the administrator applied for a renewal of the patent, he held, as assignee, an interest in it. But the application for a renewal was made by Woodworth in his capacity as administrator of the patentee, and on that ground the question must be considered.

There is no express statutory provision, authorising the administrator of the patentee to apply for a renewal of the patent.

By the tenth section of the above act, it is provided, that when the inventor or discoverer dies before a patent is obtained, his executor or administrator shall have the right to apply for and obtain the patent, in trust, for the heirs or devisees of the deceased. And in the thirteenth section, where the specification has claimed more than the patentee has invented, and he is dead, his executor, administrator or assignee, has a right to surrender the patent, and have the specification corrected.

To entitle a patentee to an extension of his patent, he must make application in writing to the commissioner of the patent office, setting forth the grounds thereof, "and, on the applicant's paying forty dollars, the commissioner

causes a notice to be published in one or more of the principal newspapers in the city of Washington," &c. stating "the time and place where the same will be considered, that any person may appear and show cause why the extension should not be granted." And the board, constituted for this purpose, are required to meet at the time and place specified; before whom the applicant is required to state under oath, the value of the invention, and of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him from and by reason of said invention." "And if upon hearing it shall appear to the entire satisfaction of the board that the term should be extended, by reason of the patentee, without neglect or fault on his part, having failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity and expense bestowed upon the same, and the introduction thereof into use, it shall be the duty of the commissioner to renew the patent, &c. and the judgment of the board shall be entered on record in the patent office," &c.

Now this language would seem to limit the right of renewal to the patentee, not only from the use of his name in the first part of the section, but from the object of the grant of renewal, it being "to secure to him a reasonable remuneration, for his time, ingenuity and expense." But still, "the benefit of the renewal extends to the assignee of the right, to the extent of his interest." And where the assignment of the whole right has been made by the patentee, it is difficult to perceive how a renewal could operate beneficially to him. There are cases, no doubt, in which the principal expense has been incurred by the assignee, who has constructed and introduced the machine into use.

In the case under consideration, however, the heirs of the

patentee, at the time of the renewal, held a principal interest in the patent, and its renewal was for their benefit.

It is intimated that the decision of the board, as to the extension of the patent, is conclusive, both as to the right granted, and the mode of granting it.

There can be no doubt that where a special tribunal is constituted, with full powers to act in certain cases, its decisions, within the scope of its authority are conclusive, if there be no superior supervising tribunal. And in this case the matter of expense, the payment of the money required, and the notice, are conclusively settled by the decision. But the question of law, as to the right of renewal, by the administrator, is not concluded.

The board seem not to have acted inconsiderately in the case. Having met on the day designated in the public notice, they adjourned to the 16th day of November, 1842, when they "heard the evidence produced before them, both for and against the extension of the patent," and they, in the very words of the law granted the extension.

Now, although this decision is not conclusive as to the legal right of the administrator, yet it cannot be wholly disregarded. It shows, at least, a practical construction, by the executive branch of the government, that the heirs of the patentee may, through their trustee, procure a renewal of a patent. There is nothing in the spirit or policy of the patent law, against this construction. On the contrary, it is in accordance with the principle and policy of that law. The same reason that would give a renewal to the patentee, would be equally strong in behalf of his heirs. If the term of the original grant had not given an adequate remuneration for "the time, ingenuity, and expense" of the patentee; on every principle of public policy, in the event of his decease, there should be a renewal for the benefit of his heirs.

That a man should be secured in the fruits of his ingenuity and labor, is a sound maxim of the common law. And it seems difficult to draw a distinction between the fruits of mental and physical labor. But, it must be admitted, that as the right asserted by the complainants arises under a statute, a substantial compliance with the requisitions of such statute must be shown. This seems to have been done, as regards the renewal of the patent in all the essential requirements of the law. If the law does not, in terms, give the right of extension to the administrator of the patentee, in behalf of his heirs, it recognises the right of an assignee of a patent, on its extension; and in other cases the rights of the administrator and heir of the patentee, are recognised and protected. From the principle of the law, its policy, and every consideration connected with the subject, it would seem that the construction of the act, in this respect, has been rightfully settled by the executive department. In this matter the board may be said to have acted judicially.

But this view does not rest alone on the consideration of the policy and principle of the law, but it has been judicially sanctioned by the circuit court of the second circuit. Judge Thompson, it seems, on this very patent, and subsequently to the extension of it, treated it, in granting an injunction, as a valid patent. No new patent was issued to the administrator, but a certificate of the extension of the original patent, in pursuance of the judgment of the board, was recorded. The rights under this patent, before its extension, remain, in every respect, the same, after its extension. The administrator acts as the trustee of the heirs; he represents the deceased. And it would seem to be a convenient and fit mode of securing that remuneration, "for the time, ingenuity, and expense" of the patentee, which is given by law, for the administrator to apply for the renewal of the patent. He can pay the money and make the exhibits

required. In this duty he does nothing more than the law requires him to do, in regard to other interests of the deceased. Upon the whole, and for the purposes of this motion, I shall consider the extension of the patent, as having been legally granted. It is argued that the specifications in this patent, are essentially defective. If this be so, the right asserted by the complainants must fail.

The specifications must contain reasonable certainty. They must so describe the parts of a machine as to enable a person, skilled in the construction of machines, to build one. And if the patent be for an improvement, the improvement must be described with the same precision. This description need not be so clear as to be understood by an individual wholly unskilled in the structure of machines.

On the 2d day of January, 1843, the administrator disclaimed "all and any exclusive right, title, property, or interest, of, in or to the application of circular saws for reducing floor plank, or other materials, to a width," &c. as stated in the specifications.

To a person unacquainted with the structure and operation of machinery, the specifications which constitute a part of the above patent, may not be easily and correctly understood. But taking them in connection with the drawing by which they were accompanied, if the affidavits of intelligent machinists can be relied on, they describe the machine so as to enable a skillful mechanic to construct it. It is true that several affidavits were presented by the defendants, of persons who think the specifications are defective. Some of the persons are represented to be mechanics, and well acquainted with the structure of machinery. But the majority are on the side of the plaintiffs. And in addition to this it would seem, that the opinions of several of the affiants, from their opportunities and experience, are entitled to greater weight than some:

of the defendants' witnesses. Judging, however, from the schedule itself, it seems to contain nothing which an intelligent mind, though but little versed in mechanics, may not fully comprehend. The moving power of the machine, as described in the schedule, in some of its parts is stated in the alternative; but this creates neither doubt nor difficulty. The effect is the same, whether produced by one mode or the other. Nor does the patentee state of what material every part of the machine should be made; but this cannot be material. The principle is the same, whether such part be composed of wood or metal.

In *Turner v. Winter*, 1 Term Rep. 606, it is said, "the patent and specification should be liberally construed." And in 3 Sumn. 374, Mr. Justice Story states it "as a clear rule of law in favor of inventions, and to carry into effect the obvious object of the constitution and law, to give a liberal construction to the language of patents, so as to protect and not destroy the rights of real inventors." The court, he says, "will in all cases adopt that interpretation of a specification which will give the fullest effect to the nature and extent of the claim made by the inventor."

In describing the improvement of a machine in use and well known, it is not necessary to state in detail the structure of the entire and improved machine. It is only necessary to describe the improvement, by showing the parts of which it consists, and the effects which it produces. Such a description in reference to the machine improved is sufficient.

An objection is made, that it does not appear there were written references to the drawings, which accompanied the specifications. The act does provide that the applicant for a patent, "shall accompany the whole with drawings and written references, where the nature of the case admits of drawings," &c. Now unless these references were necessary to an understanding of the improvement, according to

the authorities above cited, their omission cannot vitiate the patent. The description of the machine or improvement, accompanied by a drawing, may be, in many cases, perfectly understood without references.

It is further contended, that the machine set up by the defendants, does not infringe the patent under which the plaintiffs claim. There is a conflict in the affidavits presented by the parties on this point. The weight of the evidence produced seems to be with the plaintiffs. But as this question will be submitted to a jury, either by an action at law or an issue directed by this court, it may not be proper to express a decided opinion on the subject. It may be proper, however, to remark, that a mere colorable or slight alteration of a machine, or a change in its proportions, gives no ground for a patent; nor can it shelter an individual from the consequences of an infringement. In such cases the inquiry always is, whether the principle of the two machines is the same. If the principle on which the machinery works is the same, and the effect is similar in both, in contemplation of law the machines are identical. A change in the position of the operating powers, or in the thing on which the effect is produced, is of no importance. Such a modification does not rise to the dignity of an invention. There must be an essential difference in the application of the mechanical power, to make the machines dissimilar.

Making, using, or selling a patented machine, is an infringement. 1 Gall. Rep. 429. *Whittemore v. Cutter*, Phillips on Pat. 361, 371.

Is this a case for an injunction?

In most cases the court will not enjoin, until the right of complainant has been established at law. But where the injury would be irreparable, an injunction will be granted. A case of waste constitutes an exception to the general rule, and also the infringement of a patent. This is

clearly the English rule, and that is the rule of this court, unless a different one has been adopted. It is insisted that as this is an exception to the general rule in the English chancery, that it is not binding on this court.

The rule of the supreme court adopts the mode of proceeding in the high court of chancery in England, in cases where no special rule has been provided. Now the rule applicable in England to suits for waste and on patents, is as applicable here as any other rule. The exception constitutes the rule.

The complainants state that the defendants have little or no property, and could not pay the damages which might be recovered against them for an infringement of the patent. On this ground, as well as on the ground that the complainants' right is clear, an injunction is prayed. For fifteen years, the claimants, under Woodworth's patent, have enjoyed all the rights secured by it. This is an important fact, and it cannot be disregarded in this application. 6 Vesey, 707; Phillips, 401; 4 Wash. C. C. Rep. 584; *Livingston v. Van Ingen*, 9 John. Rep. 570; *Ib.* 585; 1 Mad. Ch. Pr. 113; 14 Ves. 131.

The suggestion that the improvement for which Woodworth received a patent, was not an original invention, seems not to be sustained.

"If the thing secured by patent had been in use, or had been described in a public work, anterior to the supposed discovery, the patent is void, whether the patentee had a knowledge of the previous use or description or not." *Evans v. Eaton*, 1 Peters' Rep. 322. And this rule holds if the machines are the same in principle, though they may differ in proportions and form. *Woodward v. Parker et al.* 1 Gall. 438.

In Rees' Encyclopedia, under the head of "Planing Machines," it appears that Bentham obtained a patent in England, for such a machine in 1791; and Bramah, for

a different one in 1802. But these machines were in principle, structure, and effect, essentially different from Woodworth's. At least my mind has been brought to this result, from an examination of the evidence before me.

The injunction heretofore granted in this case will be dissolved, on the defendants giving bond and security, within five days, in the sum of fifteen hundred dollars, to account to the plaintiffs, &c. should their right be finally established.

Should the defendants fail to give the above security, the injunction will be continued, on the plaintiffs giving bond and security in the like sum of fifteen hundred dollars, &c.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—OCTOBER TERM, 1843.

WEED AND OTHERS v. SNOW.

A receipt is only evidence of payment, and may be explained or contradicted by parol.

A note is not payment unless it be expressly received as such.

The safety fund law, which prohibited all banks subsequently established, from issuing notes except they are payable on demand and without interest, applies to a bank charter granted on the same day.

And where notes are issued in violation of such law, they are void.

Mr. Bates, for plaintiff.

Messrs. Williams & Ten Eyck, for defendants.

OPINION OF THE COURT.

THIS is an action of assumpsit for goods sold by plaintiffs to defendant, in May, 1838. The declaration contained the common counts, to which the general issue was pleaded.

On the trial, the plaintiffs produced the bill of goods sold to the defendant, the 4th May, 1838, by plaintiffs, which was admitted to be correct.

The defendant then produced a receipt for the payment of the goods, which was admitted to be signed by the agent of the plaintiffs.

The plaintiffs then offered the depositions of Richard O'Conner and others to prove that the receipt was given, not for cash, but for two drafts or checks made by defendant,

on the Bank of Clinton: one for five hundred dollars; the other for seven hundred and fifty dollars; the first payable at sixty days, the second, at six months, payable to the order of Jera Payne, and indorsed by him and accepted by the bank, payable in current country notes. That it was agreed between the plaintiffs and defendant at the time the drafts were received they were not considered as payment until paid. This evidence was objected to, but the court admitted the evidence.

The defendant then offered in evidence, the deposition of E. Warner, cashier of the bank of Clinton, which conduced to prove that the drafts had been credited to the account of Charles H. McClure, former cashier of said Bank, and cancelled.

To rebut the presumption of payment of the drafts by the bank, the plaintiffs then gave in evidence the proceedings in a court of chancery of the state of Michigan, in which an order for an injunction against the Clinton Bank, was made by the chancellor, August 20th, 1838; which injunction was issued and continued down to the pretended payment; and that such payment, if made, was in violation of the injunction, and consequently void. To this proceeding an objection was made, but the evidence was admitted. Under the instructions of the court the jury found a verdict for the plaintiffs; and a motion is now made for a new trial.

It is insisted the court erred in admitting parol evidence to show on what terms the receipt was given.

No principle is better settled than that a receipt is only *prima facie* evidence of payment, and may be explained, varied or contradicted, by parol or other extraneous testimony. There was nothing in the nature of the receipt offered by the defendant, to distinguish it from an ordinary receipt. It contained no agreement between the parties. *Trisler v. Williamson*, 4 Har. & McH. 219. *Ensign v.*

Webster, 1 John. Cases 145; *House v. Low*, 2 John. Rep. 378; *Tucker v. Maxwell*, 11 Mass. Rep. 143.

It is urged that the drafts were received in payment.

The facts proved show that the drafts were not received in payment; and whether so received or not, was left to the jury. On this point the verdict is sustained by the evidence.

It is contended that the bank of Clinton was not subject to the safety fund act; and that the drafts were legal.

The first section of that act provides, "that any monied incorporation having banking powers, hereafter to be created in this state, or when their charter shall be renewed or extended, shall be subject to the provisions of that act." Approved 28th March, 1836. The act establishing the Bank of Clinton was passed the same day, and consequently is within the provisions of the above act.

By the 31st section of the safety fund act, it is provided that "no monied corporation subject to this act, shall issue any bill or note of the said corporation, unless the same shall be made payable on demand and without interest."

It is proved that these drafts were accepted by the bank before they were signed by the drawer, and from their form they were evidently intended to circulate, and were, substantially, issued by the bank in payment of its debts, or otherwise, and were, as we think, in violation of the 31st section above cited. The drafts were then void, as having been drawn in violation of law.

But if this were not the case, the plaintiffs have not made the drafts their own, by failing to make demand of the bank when they were payable, and giving notice to the defendant, with the same strictness as is required on a bill of exchange by the law merchant. The drafts were payable in current bank notes, by the acceptance, and this destroyed their negotiability.

Bank of Illinois v. S. R. Brady.

The admission of the suit in chancery against the Clinton Bank was not erroneous, as it showed that the Bank could not have paid the drafts as alleged.

The motion for a new trial is overruled, and judgment.

BANK OF ILLINOIS v. S. R. BRADY.

A bill drawn and indorsed in Illinois, payable in New York, derives its character from the law of Illinois.

The law of the place of payment will regulate the interest; but the liability of the indorser depends upon the law of the place where the indorsement was made.

The indorsement is a new contract, and, like all other contracts, is governed by the *lex loci contractus*.

A defendant may waive a defect in a declaration by pleading, and if an issue be taken on the facts of the plea, by the replication, the case must turn upon the issue so made.

But, if the plaintiff demur to the plea, the court should look at the first defect in pleading.

Mr. *Walker*, for the plaintiff.

Mr. *Talbott*, for the defendant.

OPINION OF THE COURT.

THIS action is brought on a bill of exchange, drawn by Louis T. Jamison, dated 21st February, 1837, at Chicago, Illinois, on Richard Oakley, of the city of New York, four months after date, for value received, payable to the order of the defendant, at the Phenix Bank in the city of New York, for the sum of twenty-five hundred dollars—which bill was indorsed by the defendant to the plaintiff.

The defendant pleaded, first, that suit was not commenced by the plaintiff as assignee against the drawer of the bill, as required by the statute of Illinois, and therefore

that the plaintiff cannot sustain this suit. Second, that the time of payment was extended by the plaintiff for a valuable consideration.

On the second plea, the plaintiff takes issue, and demurs to the first plea. As cause of demurrer, it is alleged that the bills of exchange set forth in the declaration were payable in the city and state of New York, and the validity, nature, and obligation of the defendant's indorsement thereof must be governed by the law of the state of New York, and not of the state of Illinois.

2d. That this court will take judicial notice of the laws of Illinois, and it appearing on the face of the declaration that the bill of exchange was drawn and indorsed in Illinois, the declaration should have been demurred to.

There can be no question that the indorser is liable under the law of the state in which the indorsement is made. He undertakes that the drawer or acceptor of the bill shall pay it, at the time and place designated on the bill, and if he shall fail to do so, the indorser binds himself to pay the bill, with damages, provided the legal steps to make him liable shall have been taken. The indorsement is a new contract, and, like every other contract, is governed by the *lex loci*. The bill before us was payable in New York, and the law of New York consequently fixes the rate of interest which the holder of the bill may recover against all who are parties to it; but the character of the bill, and the liability of the defendant as indorser, are regulated by the local law. Story's Conflict of Laws, sec. 314.

The second section of the act of Illinois, in relation to promissory notes, &c. gives the right to an assignee to bring an action in his own name against the indorser, "if he shall have used due diligence by the institution and prosecution of a suit against the maker or makers of such assigned note or other instrument of writing," &c. unless it be shown that such suit would have been unavailing. No

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such diligence is averred in the declaration, and it is consequently bad. The plaintiff, in the replication to the defendant's first plea, should have set out and averred this diligence.

In regard to the second cause of demurrer, although the declaration was defective, the defendant was not bound to demur to it. By pleading specially, the defendant waived the defect in the declaration; and had the plaintiff replied as above suggested, the case would have turned upon the issue thus joined. But the demurrer to the plea carries the court back to the first defect. The plea in bar is good upon its face. The demurrer is sustained.

HOWE v. COBB ET AL.

Under the statute of Michigan, a creditor's bill may be filed on the return of an execution by the proper officer *nulla bona*, before the return day named in the writ.

The assignees may show that the defendant in the judgment had property.

This is more a question of practice, on general principles, than of construction.

Stewart & Joy, for the plaintiff.

Barstow & Lockwood, for defendants.

OPINION OF THE COURT.

THIS was a creditor's bill, "setting up a fraudulent assignment to defendant Hill, by reason of which the execution issued on the judgment obtained by the plaintiff against Cobb, was returned *nulla*."

One of the defendants demurred, and assigned the following cause of demurrer :

That the *fi. fa.* issued on the above judgment was returned before the return day named in the writ, and was, consequently, insufficient to sustain the bill.

This proceeding is under a statute of Michigan, of 1838, Revised Laws, 365, 25th section, which provides, that, "whenever an execution against the property of the defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant and every other person to compel the discovery of property, or things in action due to him, or held in trust for him," &c.

In *Smith & Williard v. Thompson*, Walker's Rep. 1, Chancellor Manning held, that an execution returned by the sheriff the 17th May, and which, on its face, was returnable the 18th, was insufficient to authorise the filing of a creditor's bill. And in the cases of *Thayer v. Swift*, and *Stafford v. Hulbert*, it was also held, previously, "that a judgment creditor's bill could not be sustained, where the execution was returned unsatisfied before the return day named in the writ; although the bill was not filed until after the return day."

In the case under consideration, the execution was returned a very short time before the return day in the writ, *nulla bona*. The marshal, in making the return, acted under a legal responsibility, and is liable to an action for a false return. Indeed his return becomes a matter of record, and is conclusive as between the parties to the judgment and the officer, except in an action for a false return. The above statute requires that the execution shall have been returned unsatisfied, before a creditor's bill can be filed; and the only question is, whether the return before the day named in the writ authorises this proceeding. We are inclined to think that where the marshal has, under his responsibility, returned the execution, being liable for a

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false return, a bill may be filed by the creditor. The object of the statute clearly was, that before the bill was filed there should be record evidence of the defendant's inability to pay the judgment; and this is shown by the return in this case. We are not prepared to say, that the assignees, as charged in the bill, may not allege in their answer, and prove on the hearing, that the defendant in the judgment has property, of which the whole or a part of the judgment might be levied.

It is insisted, that this court will follow, as has often been ruled, the settled construction of a state statute. This is admitted, but the point before us is more a question of practice than of construction. It arises upon general principles, as at what time an execution may be returned by the marshal or sheriff. Upon the whole, we think that from the character of the proceeding and the rights involved, a very technical rule on this subject is neither called for nor justified. The bill was filed before the return day, but the process, we understand, was not served until afterwards.

The demurrer to the bill is overruled.

KEMBLE, JEWETT & CO. v. LULL & DRAPER.

Where an order is drawn on A, in favor of B, if in funds, its acceptance by A, is evidence that he had in his hands funds of the drawer.

On such an order B may maintain an action against A, and his admission of funds in his hands by the acceptance, shows a consideration.

Parol proof is not admissible to show the meaning given by the parties, to certain words in a written instrument, the words being free from ambiguity.

It is too late to offer evidence in chief after the testimony has closed.

Judgment will not be arrested where no consideration is specially alleged, if the instrument declared on purports a consideration, or shows upon its face that the assumpsit was for a valuable consideration.

Kemble, Jewett & Co. v. Lull & Draper.

Mr. *Joy* for the plaintiff.

Mr. *Romeyn* for the defendant.

OPINION OF THE COURT.

THIS action is brought upon the following instrument: "Pontiac, June 21st, 1841. \$700. On the 13th day of May, 1842, pay to Kemble, Jewett & Co. seven hundred dollars, if in funds, and place the same to my account. W. J. NELSON." Directed to Messrs. Lull & Draper, and which was accepted by them.

The first count was on the order, and the plaintiffs averred that when the same became payable, a demand of payment was made of the defendants, which was refused. There was also a general count for money had and received.

A general verdict for the plaintiffs was rendered by the jury, and a motion is now made for a new trial, on points reserved.

1. The court has no jurisdiction.

This is endeavored to be maintained on the assumed ground that Nelson is the assignor of the plaintiffs, and it is not shown, that he could have sued for the demand in this court, in his own name.

Nelson is not an assignor in the sense contended. He gave an order on the defendants, in favor of the plaintiffs, for the sum in controversy, which was accepted. He is no more an assignor than the drawer of a bill of exchange is assignor to the drawee. It is the recognition of a debt by Nelson, due to the plaintiffs, and the defendants, by their acceptance, promise to pay to the plaintiffs the sum named.

2. It is contended the instrument is not a bill of exchange; that it does not purport a consideration, and that there is no promise to pay the plaintiffs.

The acceptance is an undertaking to pay the amount of the order to the plaintiffs. As the order was contingent, on the fact of having funds, it is not a bill of exchange, nor has it the properties of such an instrument. But as the order was drawn on the funds in the hands of the acceptors, after their acceptance they cannot allege a want of consideration. At what time this order was accepted does not appear, but it is in evidence that funds of the drawer were in the hands of the acceptors at the time, and they were authorised to retain in their possession, the means to meet the draft. But whether this was done or not, they are equally bound to pay the money, and having incurred this liability to the plaintiffs, *bona fide*, and on a sufficient consideration, they cannot set up as a defence a want of consideration between the drawer of the bill and the plaintiffs. *Robertson v. Fauntelroy*, S. J. B. Moore, Rep. 10. *Lilly v. Hays*, 5 Adel & Ellis, 554.

3, It is insisted that the court should have left the construction of the instrument to the jury; and should not have rejected parol proof offered to show what construction was given by the parties to the words, "if in funds." It is sufficient to say that the parol proof was not offered until the close of the testimony, when it was too late to offer evidence in chief. But the evidence was inadmissible, had it been offered at the proper time. The language of the instrument is not ambiguous, and it was the duty of the court to construe it.

4. A motion is also made in arrest of the judgment, on the ground that the special count is defective in not alleging a consideration. In this court the instrument is set out, and its acceptance, and this for reasons above stated, shows a consideration.

The motions for a new trial and in arrest of judgment are overruled.

DRAPER v. BISSEL & COMSTOCK.

After the dissolution of the partnership, one partner has no power to bind the late firm by giving a note for a partnership debt.

But where one partner is authorised by the advertisement, giving notice of the dissolution, that he is authorised to settle all accounts, for and against the firm, it is bound by his settlements, though he may not be authorised to give a new instrument for the payment of the amount.

In England the rule is different.

Where notes are given by one partner, under the above circumstances, and subsequently the other partner promises to pay the notes, it is a ratification of the power.

Messrs. *Bates & Joy*, for the plaintiff.

Mr. *Hand*, for the defendants.

OPINION OF THE COURT.

THIS action is brought on three promissory notes, signed by the defendants, as partners, for the sum of twenty-six hundred dollars. They were made payable to Goddard, and by him were indorsed to the plaintiff.

Bissel, one of the defendants, having taken the benefit of the bankrupt act, was sworn as a witness, and he stated that the notes were executed by him, the day after the partnership was dissolved, under a public notice of the dissolution, and that "he was authorised to settle all demands for and against the late firm."

It is a well established principle in the supreme court, and indeed generally, by the courts in this country, that after the dissolution of the partnership, neither partner can, by any note or bill, bind the firm for a partnership debt, though the rule seems to be different in England. And I am not prepared to say that the English decisions on this point are not better sustained on principle, than the American. *Bespham v. Patterson & Walter*, 2 McLean's Rep. 87.

Hayden v. Davis & Hopkins.

But in this case it is insisted that Comstock is bound, by the authority given to Bissel in the advertisement; and also by an express recognition of the validity of the notes.

Bissel was authorised to settle all demands for and against the late firm, and it would seem that this was a clear authority to bind his late partner by a settlement, if it did not authorise him to give notes binding the late firm for the balances due by it. But, however this may be, we can entertain no doubt that Comstock ratified the power of Bissel by agreeing to pay the notes, &c.

Verdict for the plaintiff and judgment.

HAYDEN v. DAVIS & HOPKINS.

Where a bank is prohibited by law from issuing any bill or note not payable on demand and without interest, under a penalty, any instrument issued in violation of the act is void.

An acceptance of a draft is within the law.

A parol bond to indemnify the person who signed such draft is void, because it is connected with a void instrument.

The bond was executed in Michigan, but it related to a New York transaction, which was void by the laws of that state, and this vitiates the bond.

Mr. Romeyn, for the plaintiff.

Mr. Emmons, for defendants.

OPINION OF THE COURT.

THIS suit is brought on a bond given by George W. Tracy, George Davis, and Charles A. Hopkins, in the penal sum of twelve thousand dollars, dated the 5th of July, 1841, conditioned, that the obligors shall pay, or cause to be paid, certain drafts or bills of exchange drawn on the cashier of the Phenix Bank of Buffalo, part drawn by the plaintiff in

favor of Lewis Eaton and others—part by Lewis Eaton in favor of plaintiff—which drafts amount to the sum of five thousand eight hundred and ninety-eight dollars, payable at future and different periods; which drafts were given in payment of a contract made the 6th of June, 1840, between D. Balentine, by T. Treadwell, his attorney, of the one part, and R. N. Hayden and one Lewis Eaton, of the other part, for the sale and purchase of one thousand three hundred and thirty-one shares of stock in the Bank of Constantine, in the state of Michigan, and shall fully discharge the said R. N. Hayden from all liabilities for or on account of the same, and shall fully indemnify and save harmless the said R. N. Hayden of and from all suits, &c. then the obligation to be void, &c.

The defendants pleaded that it was agreed the above drafts should be accepted by the Phenix Bank of Buffalo, before they were received in payment for said stock; that they were so accepted by A. K. Eaton, cashier, and Lewis Eaton, president, which was in violation of law, &c.

Plaintiff replied, that the contract of purchase was made at Constantine, in Michigan, and was transferred to plaintiff and Eaton by Balentine, at the above place; that five thousand dollars were paid by plaintiff and Eaton to the said Balentine in part; and for the residue of said consideration the drafts were executed and delivered to Balentine, which remain unpaid; that the said plaintiff and Eaton, at Buffalo, at the instance of the defendants and George W. Tracy, assigned and transferred all of the stock to defendant Hopkins, and the same was thereupon accepted and received by the said Hopkins; and the plaintiff further avers that as the consideration of the said transfer and sale, it was then and there agreed that the said defendant and the said Davis should pay said drafts, and should execute their bond therefor, &c.

To this the defendants demurred.

The pleadings raise the question, whether the drafts, for the payment of which the bond was executed by the defendants, were legal.

In the General Statutes of New York, page 63, sec. 4, it is provided, that "no banking association, or individual banker, as such, shall issue or put in circulation any bill or note of said association or individual banker, unless the same shall be made payable on demand, and without interest. And every violation of this section by any officer or member of a banking association, or any individual banker, shall be deemed and adjudged a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court," &c. *Ib.* 73, sec. 4.

A construction was given to this statute, in *Smith v. Strong*, 2 Hill, 241, in which it was held that an acceptance made in violation of it was void. The law being a general one, all are bound to take notice of it. And on general principles there would seem to be no doubt, that any contract expressly prohibited by law is void. *Brusly v. Bignald*, 5 Barn. & Ald. 335; *Com. on Contracts*, 66; *Songter v. Hughes*, 1 Maule & Selw. 593; *Bell v. Scott*, *Ibid.* 794; *Chitt. on Contracts*, 420, 422, 423; *Story's Conflict of Laws*, sec. 247.

The bond is not for the payment of money, but to indemnify the plaintiff against the above drafts. On a mere bond of indemnity, no action can be sustained until the party is damnified. The drafts are unpaid, and it does not appear from the pleadings how and to what extent the plaintiff has been injured by drawing and being connected with the drafts. But do the invalidity of these drafts avoid the bond? Of this there would seem to be no doubt, if the bond grew out of or was connected with the drafts. The rule is, that "where the contract grows immediately out of

Bleeker v. Hyde.

the illegal act, or is connected with it, justice will not lend its aid to enforce it." 4 Wash. C. C. 207, and authorities above cited.

The bond was executed in Michigan, but it relates to a New York transaction, which is void by the laws of that state, and this vitiates the bond.

The demurrer to the replication is sustained.

BLEEKER v. HYDE.

A letter of credit, to a particular firm, and which guaranties the payment, will not bind the guarantor, if the purchase be made of other persons.

Such a contract is not to be extended beyond the manifest intention of the parties.

But where the goods were purchased in the name of the guarantor, and he examines the invoices and approves of the same, he is clearly bound.

And especially is he bound, if he take possession of the goods, with the view of preventing a loss.

Under such circumstances no notice of the acceptance of the guaranty was necessary.

Messrs. *Joy & Lockwood*, for the plaintiff.

Messrs. *Buell & Wetherall*, for defendants.

OPINION OF THE COURT.

THE defendant gave the following letter of credit:—
"Messrs. Erastus Corney & Co. New York. Gentlemen, I hereby authorise Messrs. A. & D. Wallingsford to purchase goods, such as they may wish to, in my name and on my account, to the amount of twenty-five hundred dollars. (Signed,) O. M. HYDE, 20th Sept. 1841." Under this letter Wallingsfords purchased goods of Corney & Co. to the amount of \$1453, and of the plaintiff to the amount of \$1046 04.

It is objected that the letter of credit did not authorise a

purchase from the plaintiff, and that consequently the defendant is not bound.

In *Grant v. Naylor*, 4 Cranch, 224, it was held that a letter of credit addressed by mistake to John and Joseph Naylor, and delivered to John and Jeremiah Naylor, will not support an action by John and Jeremiah, for goods furnished by them to the bearer, upon the faith of the letter of credit. A surety is not answerable beyond the scope of his engagement. *Walsh & Beckman v. Bailie*, 10 John. Rep. 179. *Penoyer v. Watson*, 16 John. 99. *Robbins v. Bingham*, 4 John. 475.

Although the letter of defendant is directed to Corney & Co., yet it does not appear from its language to have been alone intended for them. The language is general—"that he had authorised A. & D. Wallingsford, to purchase goods on his account to the amount of twenty-five hundred dollars." He does not say he had authorised the purchase of goods from them. Had such been the language of the letter, it would be clear from the cases above cited, that, by virtue of the letter, the defendant would not have been bound by a purchase from any other person or firm.

But the case does not necessarily turn upon the construction of the letter of credit, as it has been proved that after the purchases were made, the defendant saw and approved of the invoices. And it further appears that the defendant took the remaining goods into possession, on the ground that he was bound to pay for them. The goods were charged to the defendant in the invoices.

This is sufficient to show that the defendant approved of the purchases, and he is consequently bound to pay for them.

No notice of the acceptance of the letter of credit, by the plaintiff, was necessary, as the purchases were made in the name of the defendant. Verdict for the plaintiff and judgment.

FELLOWS ET AL. v. HALL & ALLEN.

Bankruptcy should be pleaded at law and in equity.

Until this is done, the plaintiff has no notice of the bankruptcy.

The defendant may waive his discharge.

A decree *pro confesso*, when irregularly entered, as a matter of course, will be set aside on motion.

Messrs. *Hand & Walker*, for complainants.

Messrs. *Douglass & Walker*, for defendants.

OPINION OF THE COURT.

THIS is a creditor's bill. It was filed the 22d August, 1842. The 10th of October, a decree *pro confesso* was entered against the defendant Hall, and on the 10th of November ensuing, a decree *pro confesso* was entered against both of the defendants.

Before the bill was filed, the defendant Hall applied to be declared a bankrupt; and on the 18th of September, 1842, he was declared a bankrupt, and an assignee was appointed. And a motion is now made to set aside the proceedings in the chancery suit after that date.

The facts on which the motion is founded are stated in an affidavit.

Formerly it was held that the bankruptcy of a party to a suit abated it, and lord Eldon so decided in the case of *Russell v. Sharpe*, 1 Ves. & Beams, 500. In *Randall v. Mumford*, 18 Ves. 424, his lordship said, "this court, however, without saying whether bankruptcy is or is not strictly an abatement, has said that, according to the course of practice of the court, the suit has become as defective as though it had abated." And in *Monteith v.*

Taylor, 5 Ves. 615, he held, if a defendant becomes bankrupt or insolvent, the plaintiff brings the assignees before the court by a supplemental bill, and if he neglects to do so, and to prosecute the suit, the bankrupt defendant may move to dismiss the bill for want of prosecution.

The plea of bankruptcy is not properly a plea in abatement. It is sometimes classed among pleas in abatement to the person, but it is rather a plea in bar. Story's Eq. Pl. sec. 726. Until this plea is interposed, the plaintiff is not bound to take notice of the bankruptcy of the defendant. He may indeed waive the defence, rather than draw in question the validity of the proceeding in bankruptcy. The 4th section of the bankrupt act provides that a discharge and certificate, when duly granted, "shall be, and may be pleaded as a full and complete bar to all suits," &c.

This is not a favored defence. It may be defeated if the discharge was fraudulently obtained. And we think it should be pleaded both at law and in equity, and cannot be taken advantage of by motion. Whether the bankrupt was guilty of fraud in obtaining his discharge, may be a question of great difficulty, involving, as questions of fraud frequently do, a great variety of facts, which should be submitted to a jury. If the discharge were obtained before the answer was filed, it should be set forth in the answer, or be made the subject matter of a plea. If, after answer filed, then special leave should be given to the defendant, that he may plead it.

But it seems that in this case the decree *pro confesso* was prematurely entered, as by the rules of court, the tenth of October was the first rule day on which a rule on the defendant to answer could be entered. The bill was filed the 22d August; no rule could be taken for answer on the first Monday of September, as twenty days had not elapsed from the filing of the bill. The first Monday in October was the first rule day on which the defendant could

Treadwell v. Cleaveland.

be required to answer. But on that day a decree *pro confesso* was entered against Hall, in violation of our rules of practice. On this ground, the decree against Hall may be set aside, and all subsequent proceedings.

TREADWELL v. CLEAVELAND.

The process on the defendant in chancery must be served twenty days before the defendant is bound to appear.

And a rule for answer, where the process has not been so served, is irregular.

A decree *pro confesso*, for want of an answer, under such a rule, is also irregular.

And if a final decree be entered, in virtue of the above proceedings, the court, on motion, will set the whole aside.

Under the 40th rule, the defendant is not bound to answer, unless special interrogatories be put in the bill. Such a bill is clearly demurrable.

Messrs. *Baker, Harris, and Milliard*, for complainants.

Messrs. *Douglass & Walker*, for defendants.

OPINION OF THE COURT.

THIS is a motion to set aside the following proceedings for irregularity.

The bill of complaint was filed the 11th of July, 1842.

On the 1st Monday of September, a rule for answer was taken, and on the first Monday of October following, a decree *pro confesso* was entered, which, being referred to a master on the 21st of the same month, and the master's report being made on the same day, a final decree was entered by the court.

These proceedings were wholly irregular, and must be set aside. By the 12th rule in chancery, on filing the bill, the clerk is required to issue the process of subpoena, returnable into the office on the next rule day, or the next

but one, at the election of the plaintiff, "occurring twenty days from the issuing thereof," to the return. As the month of August came in on Monday, the subpoena was necessarily returnable on the first Monday of September. And the 17th rule declares that the appearance day of the defendant shall be the rule day to which the subpoena is made returnable, "provided he has been served with process twenty days before that day," otherwise his appearance day shall be the next rule day when the process is returnable.

The process in this case has not been returned, but it could not have been served so as to make it returnable before the first Monday in October, and the defendant could have been under no default for want of an answer before the first Monday in November. But the decree *pro confesso* was entered, and also the final decree, in October. On this ground the proceedings must be set aside.

It may not be improper to remark, that independently of the above, the bill in its form is radically defective. By the 40th rule, it is declared, "that a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto." The above bill contains no such interrogatory. And it is very questionable whether the defendant can be in default for not answering a bill which, under the above rule, he is not bound to answer. The bill is clearly demurrable on this ground.

In the matter of Ankrim, a Bankrupt.

IN THE MATTER OF ANKRIM, A BANKRUPT.

A petition under the bankrupt law, filed on the 3d March, 1843, the day the law was repealed, is within the saving of that act.

Formerly acts of parliament were held to take effect from the commencement of the session.

And by this relation penalties amounting to forfeiture of life were incurred.

This was afterwards remedied by statute.

The act repealing the general bankrupt law, saved all cases commenced before the passage of the repealing act.

If by a fiction of law this act can be made to relate to any time before the actual passage of it, it is liable to the same objection as the English former rule.

The maxim that the fraction of a day is not recognised in law, cannot be made to operate cruelly and unjustly.

A liberal construction may be given to the repealing act, in favor of the remedial proceedings under the general bankrupt law.

An application for a discharge in this case, is but the extension of the original proceeding.

Barstow, for plaintiff.

Joy, for defendant.

OPINION OF THE COURT.

At the suit of his creditors, the petitioner having been declared a bankrupt, filed a petition for his discharge on the 3d March, 1843, and the only question in the case is, whether it was filed in time. This question has been certified to this court, under the bankrupt act, from the district court.

The act repealing the general bankrupt law, was passed the 3d March, 1843, and provided that "(the repeal)" "shall not affect any case or proceeding in bankruptcy, commenced before the passage of that act."

In *Matthews v. Zane*, 7 Wheat. 164, the court say, "the known rule being, that the statute, for the commencement of which no time is fixed, commences from its date."

In the matter of Ankrum, a Bankrupt.

In England, it was long held that "every statute begins to have effect, unless a time for its commencement is therein mentioned, from the first day of that session of parliament in which it is made." Bacon's Ab. 636, Let. C.; and this was applied to criminal as well as civil cases. In the case of the *King v. Thurston*, 1 Leo. Rep. 91, by this relation, an act was made murder, which was not so when the act was committed. And this rule of construction was sanctioned by the house of lords. *Attorney Gen. v. Panter*, 6 Bro. P. C, 533. The monstrous injustice of this was remedied by the statute of the 33 George III. ch. 13, which declared that statutes should have effect only from the time they received the royal assent.

It is unaccountable that this construction should have been continued by the English courts down to the year 1772. Nothing could show more forcibly with what pertinacity enlightened judges adhere to an established construction of statutes. This is not objectionable, where no injustice is done to private rights by the construction. But where, as in the above case, the law was made to have a retrospective effect, even to the forfeiture of life, it is a reproach to the tribunals of justice. In our government, such a statute would be *ex post facto*, and in violation of the constitution of the United States. The injustice of this construction in regard to civil rights, is equally clear, except where the provision is of a remedial character. Chancellor Kent, 1 Comm. 455, says, "a retroactive statute would partake in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle."

The rule of construction in this country, is that a statute takes effect, if not otherwise provided, on the day of its passage, including that day. Now this embraces the principle repudiated by the British statute. And no better

In the matter of Ankrim, a Bankrupt.

reason is given than that the fraction of a day cannot be recognized in law; and as the statute was passed on the 3d of March, that day must necessarily be included.

That to notice the fraction of a day would be productive of inconvenience, is readily admitted. In most cases where no rights are impaired by the statute, there could be no ground of complaint; but suppose a legislature should make a certain act a capital offence, and the law should take effect on the day of its date, could an individual be punished under it, for an act done on the same day, but before the statute was, in fact, passed. If, in such a case an individual could be punished, it would be in virtue of a fiction of law; and there is no difference in principle, in a fiction that shall give the act a retroactive effect of half a day or half a year. In the one case, as well as in the other, when the act complained of was done, it was innocent, but a statute, subsequently passed, makes it penal. And if punishment in the one case can be inflicted, it may be in the other. The only difference is in time, not in principle.

A rule of construction which leads to such a result, cannot be a sound one. Like many technicalities which have grown out of judicial action, the fiction is sustained neither by justice nor reason. So far as relates to crime, the only reasonable and just rule of construction would be, that until after its promulgation the law cannot take effect. Any thing short of this might well be compared to the edicts of the Roman emperor, who elevated them so high that the people could not read them. Indeed, our modern legislation would be more cruel, unjust and revolting. By great effort, possibly, the edicts might have been read, but no human effort can read that which belongs to the future, and which depends upon contingencies. But after the law is passed, who can have notice of it until it shall be published.

In the matter of Ankrim, a Bankrupt.

Remedial laws are not objectionable on this ground. They only remove a technical objection, and give effect to a *bona fide* transaction, as was the intention of the parties. But to all other legislation affecting personal rights, the objection holds.

In the case of *Pugh and wife v. Duke of Leeds*, 2 Cowper, 714, there was much discussion whether the words in a lease, "to commence from the day of the date," meant inclusive or exclusive of the day it bore date. Lord Mansfield, after a laborious discussion, overruled his former decisions, and came to the conclusion that the words might be construed to include or exclude the day of the date, as from the context might appear to have been the intention of the parties. In that case, as the validity of the lease depended upon its taking effect on the day of its date, and as the court presumed it was the intention of the parties to make a valid lease, they held that the lease took effect on the day it was dated. But prior to that decision the general view had been, that "from the day of the date," in an instrument, excluded the day of the date.

All who are acquainted with the history of legislative action in Congress know that bills passed on the 3d of March, in what is called the short session, are signed by the president late in the evening of that day, and are not published until some days afterwards. But the repealing act in question provides, "that it shall not affect any case or proceeding in bankruptcy commenced before the passage of that act." Now suppose by a fiction the repealing law would take effect so as to include that day; still the saving goes to the passage of the act, and not to the time it took effect.

Where the computation of time in a statute is to be from an act done, the first day should be excluded. *Ex parte Dedn*; 2 Cow. 605, 606; *Homan v. Liswell*, 6 Cow. 659.

But this cannot be considered an original application for

the benefit of the act. The petitioner having been declared a bankrupt on the 3d of March, 1842, he applied for his discharge. This is a proceeding depending upon the procedure of his creditors and inseparably connected with it. In fact and in law, it must be considered as a continuation of the former proceeding. In this view no doubt can be entertained, as the petitioner was declared a bankrupt before the repeal of the bankrupt law.

There is nothing in this application to prevent the court from giving a liberal construction of the saving in the repealing act, with the view of carrying out the remedial provisions of the bankrupt law.

Upon the whole, I think the petition for the discharge, filed the 3d of March, 1843, was within the statute, as the decree of bankruptcy against the petitioner, in the form presented, constitutes a part of those proceedings; and that, consequently, the district court has jurisdiction of the petition, and may act upon it as the law authorises. This opinion may be certified to the district court.

WILLIAMS v. SINCLAIR.

Where a plaintiff is called on to furnish a bill of particulars, he is limited in his proof to the items thus made out.

If the bill be found to be erroneous, after the jury to try the case are empannelled, the plaintiff will have to suffer a nonsuit.

A nonsuit will be set aside, in the discretion of the court, where justice requires it. If there has been surprise, or the plaintiff has equity, the nonsuit will be set aside.

Bates, for plaintiff.

Goodwin & Collins, for defendant.

OPINION OF THE COURT.

THIS action of assumpsit is brought on the following state of facts: The defendant was county treasurer in 1840, and as such made sales of lands at public auction, returned as non-resident land for non-payment of the taxes for the year 1837. At the sale, the plaintiff purchased a large number of tracts, on which he paid several thousand dollars, and received from the defendant, for each tract, the usual certificate of sale. The defendant, it is alleged, added several illegal items to the tax charges, and included them in the aggregate sum for which each tract was sold, thereby, as the plaintiff insists, rendering the sale illegal and void. Of the sums thus received the defendant paid over to the county the tax and interest, and retained the illegal charges; and this action is brought to recover the amount thus illegally exacted.

On the trial, the plaintiff having served the defendant with a bill of particulars, discovered that the items were erroneously put down, submitted to a nonsuit, with leave to move to set it aside. And now that motion is made.

This motion is addressed to the discretion of the court. Where a plaintiff has suffered a nonsuit, through gross carelessness, or where it is manifest from the trial that he is without merits, the court will not set aside the nonsuit. And in this respect, it comes under the rule applicable to a motion for a new trial. But where the plaintiff has been surprised, or where it is clear that he has merits, the nonsuit will be set aside. This will be done on both grounds, for the purposes of justice. As the court usually requires the plaintiff to pay, at least, the costs of the trial, if not all the costs that have accrued, no hardship is imposed on the defendant. If the defendant acted fraudulently, as alleged,

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in charging illegal items, as a part of the tax, which items he retained and did not pay over to the county or state, it is not clear that the plaintiff may not recover the amount. He cannot recover the illegal items from the owner of the land, as the owner can only be charged with the tax imposed by law. The county or state never having received the items, cannot be called on to refund them; and the defendant having received them without authority of law, may be compelled to account to the plaintiff. At least the facts show, that the plaintiff has a *prima facie* case.

The nonsuit is set aside, on the plaintiff's paying the costs of the term.

WHITE v. HOW ET AL.

A plea to an action against the directors of a bank, under the Michigan act of 1837, which makes them personally liable, where the bank is insolvent, &c. which avers the notes on which the action was brought were fraudulently put into circulation, is no answer to the declaration.

The plaintiff must be connected with the fraud, or at least have had notice of it.

A bank is answerable for the acts of its agent. And it is immaterial how notes get into circulation, if they come into the hands of the holder *bona fide*.

The proceeding by the bank commissioners under the statute is no bar to an action against the directors, to make them personally liable.

All that the holder of the notes could claim, from such a proceeding, would be a *pro rata* payment of the assets.

That plea is defective which, admitting its averments to be true, does not constitute a bar to the action.

A plea of bankruptcy which sets out the certificate and discharge, as required in the 4th section, is good.

Mr. *Seaman*, for the plaintiff.

Messrs. *Romeyn & Miles*, for defendants.

OPINION OF THE COURT.

THIS action is brought against the defendants, as directors of the Saline Bank of Michigan, charging them with the

amount of plaintiff's demand, under the statutes of the state, for a violation of law which regulated their duties. At October term, 1842, this case was before the court on a demurrer to the declaration, which was overruled, and leave was given to the defendants to plead, &c. See page 111 of the present volume.

The 25th section of the act of the 15th of March, 1837, in relation to banks, declares, that, if the total amount of debts shall at any time exceed three times the amount of capital stock paid, "for all such excess and all deficits, occasioned by insolvency of such bank, the directors, in the first place, shall be liable in their individual capacity," &c.

The general issue was first pleaded.

2. That the bank notes on which the action is founded, with others, came into the possession and control of one Lewis Goddard, who, without the sanction of the bank, fraudulently used the same for his own purpose, and that the bank never received any value therefor. Without this, that the notes described in the plaintiff's declaration, as held by him, were issued by said bank. To this plea there was a demurrer.

This plea is bad. It would not be sustainable if the action were against the bank. It is a well-established rule that every legal intendment is made against the plea. It does not show how the notes came into the hands of Goddard. If they were placed in his hands as agent of the bank, it would be clearly bound for any exercise of bad faith on his part, unless fraud in the plaintiff were alleged, which is not done. But, admit that the notes were obtained by Goddard fraudulently and put into circulation, if they come into the hands of an innocent holder in the ordinary course of business, the bank is bound to pay them. The notes were payable to bearer, and passed by delivery. It is then a matter of no importance, as regards the right of the plaintiff, how the notes were put into circu-

lation, if they came into his possession without notice of fraud or unfairness; and as this is not averred in the plea, it cannot be presumed. 1 Bos. & Pul. 650; *Bay v. Codrington*, 5 John. Ch. Rep. 56 to 58; Story on Agency, 451, 453, 464 to 467.

3. The defendants plead that the bank commissioners, on the 1st of November, 1838, filed a bill against the bank, under the act of the state, and that before the commencement of this suit John B. Guilteau was appointed by the chancellor receiver of the property and effects of said bank, with all the power and authority, and subject to all the obligations and duties imposed upon such receiver, by the statute in such case made, and that he continued to be such receiver till after the commencement of this suit, &c.

And they further aver, that before the commencement of this suit, the notes were deposited with said receiver as a part of the liabilities of said bank, and were held by him in trust for the owners thereof, to be paid out of the assets of the bank. And the defendants aver that the said notes were in the hands of the receiver a long time after the suit was commenced.

This plea is no answer to the declaration. There is no averment that any part of the notes were paid by the receiver, or that he had any assets in his hands out of which they could be paid. The proceeding under the statute was with the view of closing the operations of the bank, and to secure its creditors. The present action is against the directors, on a liability incurred by them personally, by excessive issues of paper. The proceeding under the statute is no bar to this action. All that could be claimed by the defendants is, that the assets of the bank should be applied *pro rata* to discharge the notes held by the plaintiff; but there is no averment of assets.

4. This plea varies in language from the third, but is not different in principle.

5. This plea sets out the proceeding in chancery, injunction, receiver, and avers that at the time of the appointment of the receiver the notes were the property of the bank, in the possession of its agents and officers.

This is not a sufficient answer to the declaration. The facts of the plea may all be admitted, and yet it does not follow that the plaintiff has no right to recover. The question is, were the notes on which the action was founded the property of the plaintiff, and is he still the owner, now that he asks judgment on them? A traverse, then, of the facts of the plea would not raise the main point in the case, as to the right of the plaintiff. A traverse must not be of matter of inducement, but of the main and turning points in the case.

The same remarks apply to the 7th plea. Upon the whole, the demurrer to the pleas above enumerated is sustained.

There is still a plea of bankruptcy by Wallace, one of the defendants. It is objected that this plea is defective, as it does not set out the proceedings under which the bankruptcy was decreed.

The fourth section of the bankrupt law provides, that "such discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence, of itself, in favor of such bankrupt," &c. The plea is substantially good. It is not necessary to set out in such plea more than the certificate and discharge duly authenticated. The above provision makes these evidence, and conclusive evidence, unless the proceedings shall be shown to have been fraudulent.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—DECEMBER TERM, 1843.

BOYD v. BROWN.

The exclusive grant in a patent is, the construction and use of the thing patented.

Where the right consists in certain instruments by which a bedstead of a particular structure is made, the structure or use of these instruments is prohibited.

A patentee for a flouring mill of a certain structure has an exclusive right to make and use such mill, but he can claim no monopoly in the sale of the flour he manufactures.

The court will not enjoin the sale of a similar article under the same patent, in a particular district assigned to an individual, though manufactured in a different district.

Mr. *Kenna* appeared for the plaintiff.

Mr. *Chase* for the defendant.

OPINION OF THE COURT.

THE complainant filed his bill, representing that he is the legal owner of a certain patent right, within the county of Hamilton, in Ohio, for making bedsteads of a particular construction, which is of great value to him; that the defendant, professing to have a right under the same patent, to make and vend bedsteads in Dearborn county, Indiana, which the complainant does not admit, but denies; that the defendant sends the bedsteads he manufactures to Hamilton county to sell, in violation of the complainant's patent; and he prays that the defendant may be enjoined

from manufacturing the article and vending it within Hamilton county, &c.

The defendant sets up in his answer a right duly assigned to him to make and vend the article in Indiana, and that he is also possessed of an improvement on the same; and he denies that the sales in Hamilton county, complained of by the complainant, are made at his instance, or for his benefit.

A motion is now made for an injunction, before the case is prepared for a final hearing.

On the part of the complainant, it is contended, that, by his purchase of the right to make and vend the article within Hamilton county, he has an exclusive right to vend as well as to make, and that his right is infringed by the sales complained of; that his right is notorious, and is not only known to the defendant, but to all those who are engaged in the sales stated.

If the defendant, who manufactures the bedsteads in Indiana, be actually engaged in the sale of them in Hamilton county, it might be necessary to inquire whether this is a violation of the complainant's right. But, as this fact is denied in the defendant's answer, for the purposes of this motion, the answer must be taken as true, and that question is not necessarily involved.

The point for consideration is, whether the right of the complainant is infringed by a sale of the article within the limits of the territory claimed by complainant.

It is not difficult to answer this question. We think that the article may be sold at any and every place, by any one who has purchased it for speculation or otherwise.

There can be no doubt that the original patentee, in selling rights for counties or states, might, by a special covenant, prohibit the assignee from vending the article beyond the limits of his own exclusive right. But, in such a case, the remedy would be on the contract, and not under

the benefit of the act. The petitioner having been declared a bankrupt on the 3d of March, 1842, he applied for his discharge. This is a proceeding depending upon the procedure of his creditors and inseparably connected with it. In fact and in law, it must be considered as a continuation of the former proceeding. In this view no doubt can be entertained, as the petitioner was declared a bankrupt before the repeal of the bankrupt law.

There is nothing in this application to prevent the court from giving a liberal construction of the saving in the repealing act, with the view of carrying out the remedial provisions of the bankrupt law.

Upon the whole, I think the petition for the discharge, filed the 3d of March, 1843, was within the statute, as the decree of bankruptcy against the petitioner, in the form presented, constitutes a part of those proceedings; and that, consequently, the district court has jurisdiction of the petition, and may act upon it as the law authorises. This opinion may be certified to the district court.

WILLIAMS v. SINCLAIR.

Where a plaintiff is called on to furnish a bill of particulars, he is limited in his proof to the items thus made out.

If the bill be found to be erroneous, after the jury to try the case are empannelled, the plaintiff will have to suffer a nonsuit.

A nonsuit will be set aside, in the discretion of the court, where justice requires it. If there has been surprise, or the plaintiff has equity, the nonsuit will be set aside.

Bates, for plaintiff.

Goodwin & Collins, for defendant.

OPINION OF THE COURT.

THIS action of assumpsit is brought on the following state of facts: The defendant was county treasurer in 1840, and as such made sales of lands at public auction, returned as non-resident land for non-payment of the taxes for the year 1837. At the sale, the plaintiff purchased a large number of tracts, on which he paid several thousand dollars, and received from the defendant, for each tract, the usual certificate of sale. The defendant, it is alleged, added several illegal items to the tax charges, and included them in the aggregate sum for which each tract was sold, thereby, as the plaintiff insists, rendering the sale illegal and void. Of the sums thus received the defendant paid over to the county the tax and interest, and retained the illegal charges; and this action is brought to recover the amount thus illegally exacted.

On the trial, the plaintiff having served the defendant with a bill of particulars, discovered that the items were erroneously put down, submitted to a nonsuit, with leave to move to set it aside. And now that motion is made.

This motion is addressed to the discretion of the court. Where a plaintiff has suffered a nonsuit, through gross carelessness, or where it is manifest from the trial that he is without merits, the court will not set aside the nonsuit. And in this respect, it comes under the rule applicable to a motion for a new trial. But where the plaintiff has been surprised, or where it is clear that he has merits, the nonsuit will be set aside. This will be done on both grounds, for the purposes of justice. As the court usually requires the plaintiff to pay, at least, the costs of the trial, if not all the costs that have accrued, no hardship is imposed on the defendant. If the defendant acted fraudulently, as alleged,

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in charging illegal items, as a part of the tax, which items he retained and did not pay over to the county or state, it is not clear that the plaintiff may not recover the amount. He cannot recover the illegal items from the owner of the land, as the owner can only be charged with the tax imposed by law. The county or state never having received the items, cannot be called on to refund them; and the defendant having received them without authority of law, may be compelled to account to the plaintiff. At least the facts show, that the plaintiff has a *prima facie* case.

The nonsuit is set aside, on the plaintiff's paying the costs of the term.

WHITE v. HOW ET AL.

A plea to an action against the directors of a bank, under the Michigan act of 1837, which makes them personally liable, where the bank is insolvent, &c. which avers the notes on which the action was brought were fraudulently put into circulation, is no answer to the declaration.

The plaintiff must be connected with the fraud, or at least have had notice of it.

A bank is answerable for the acts of its agent. And it is immaterial how notes get into circulation, if they come into the hands of the holder *bona fide*.

The proceeding by the bank commissioners under the statute is no bar to an action against the directors, to make them personally liable.

All that the holder of the notes could claim, from such a proceeding, would be a *pro rata* payment of the assets.

That plea is defective which, admitting its averments to be true, does not constitute a bar to the action.

A plea of bankruptcy which sets out the certificate and discharge, as required in the 4th section, is good.

Mr. Seaman, for the plaintiff.

Messrs. Romeyn & Miles, for defendants.

OPINION OF THE COURT.

THIS action is brought against the defendants, as directors of the Saline Bank of Michigan, charging them with the

amount of plaintiff's demand, under the statutes of the state, for a violation of law which regulated their duties. At October term, 1842, this case was before the court on a demurrer to the declaration, which was overruled, and leave was given to the defendants to plead, &c. See page 111 of the present volume.

The 25th section of the act of the 15th of March, 1837, in relation to banks, declares, that, if the total amount of debts shall at any time exceed three times the amount of capital stock paid, "for all such excess and all deficits, occasioned by insolvency of such bank, the directors, in the first place, shall be liable in their individual capacity," &c.

The general issue was first pleaded.

2. That the bank notes on which the action is founded, with others, came into the possession and control of one Lewis Goddard, who, without the sanction of the bank, fraudulently used the same for his own purpose, and that the bank never received any value therefor. Without this, that the notes described in the plaintiff's declaration, as held by him, were issued by said bank. To this plea there was a demurrer.

This plea is bad. It would not be sustainable if the action were against the bank. It is a well-established rule that every legal intendment is made against the plea. It does not show how the notes came into the hands of Goddard. If they were placed in his hands as agent of the bank, it would be clearly bound for any exercise of bad faith on his part, unless fraud in the plaintiff were alleged, which is not done. But, admit that the notes were obtained by Goddard fraudulently and put into circulation, if they come into the hands of an innocent holder in the ordinary course of business, the bank is bound to pay them. The notes were payable to bearer, and passed by delivery. It is then a matter of no importance, as regards the right of the plaintiff, how the notes were put into circu-

lation, if they came into his possession without notice of fraud or unfairness; and as this is not averred in the plea, it cannot be presumed. 1 Bos. & Pul. 650; *Bay v. Codrington*, 5 John. Ch. Rep. 56 to 58; Story on Agency, 451, 453, 464 to 467.

3. The defendants plead that the bank commissioners, on the 1st of November, 1838, filed a bill against the bank, under the act of the state, and that before the commencement of this suit John B. Guiteau was appointed by the chancellor receiver of the property and effects of said bank, with all the power and authority, and subject to all the obligations and duties imposed upon such receiver, by the statute in such case made, and that he continued to be such receiver till after the commencement of this suit, &c.

And they further aver, that before the commencement of this suit, the notes were deposited with said receiver as a part of the liabilities of said bank, and were held by him in trust for the owners thereof, to be paid out of the assets of the bank. And the defendants aver that the said notes were in the hands of the receiver a long time after the suit was commenced.

This plea is no answer to the declaration. There is no averment that any part of the notes were paid by the receiver, or that he had any assets in his hands out of which they could be paid. The proceeding under the statute was with the view of closing the operations of the bank, and to secure its creditors. The present action is against the directors, on a liability incurred by them personally, by excessive issues of paper. The proceeding under the statute is no bar to this action. All that could be claimed by the defendants is, that the assets of the bank should be applied *pro rata* to discharge the notes held by the plaintiff; but there is no averment of assets.

4. This plea varies in language from the third, but is not different in principle.

5. This plea sets out the proceeding in chancery, injunction, receiver, and avers that at the time of the appointment of the receiver the notes were the property of the bank, in the possession of its agents and officers.

This is not a sufficient answer to the declaration. The facts of the plea may all be admitted, and yet it does not follow that the plaintiff has no right to recover. The question is, were the notes on which the action was founded the property of the plaintiff, and is he still the owner, now that he asks judgment on them? A traverse, then, of the facts of the plea would not raise the main point in the case, as to the right of the plaintiff. A traverse must not be of matter of inducement, but of the main and turning points in the case.

The same remarks apply to the 7th plea. Upon the whole, the demurrer to the pleas above enumerated is sustained.

There is still a plea of bankruptcy by Wallace, one of the defendants. It is objected that this plea is defective, as it does not set out the proceedings under which the bankruptcy was decreed.

The fourth section of the bankrupt law provides, that "such discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence, of itself, in favor of such bankrupt," &c. The plea is substantially good. It is not necessary to set out in such plea more than the certificate and discharge duly authenticated. The above provision makes these evidence, and conclusive evidence, unless the proceedings shall be shown to have been fraudulent.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—DECEMBER TERM, 1843.

BOYD v. BROWN.

The exclusive grant in a patent is, the construction and use of the thing patented.

Where the right consists in certain instruments by which a bedstead of a particular structure is made, the structure or use of these instruments is prohibited.

A patentee for a flouring mill of a certain structure has an exclusive right to make and use such mill, but he can claim no monopoly in the sale of the flour he manufactures.

The court will not enjoin the sale of a similar article under the same patent, in a particular district assigned to an individual, though manufactured in a different district.

Mr. *Kenna* appeared for the plaintiff.

Mr. *Chase* for the defendant.

OPINION OF THE COURT.

THE complainant filed his bill, representing that he is the legal owner of a certain patent right, within the county of Hamilton, in Ohio, for making bedsteads of a particular construction, which is of great value to him; that the defendant, professing to have a right under the same patent, to make and vend bedsteads in Dearborn county, Indiana, which the complainant does not admit, but denies; that the defendant sends the bedsteads he manufactures to Hamilton county to sell, in violation of the complainant's patent; and he prays that the defendant may be enjoined

from manufacturing the article and vending it within Hamilton county, &c.

The defendant sets up in his answer a right duly assigned to him to make and vend the article in Indiana, and that he is also possessed of an improvement on the same; and he denies that the sales in Hamilton county, complained of by the complainant, are made at his instance, or for his benefit.

A motion is now made for an injunction, before the case is prepared for a final hearing.

On the part of the complainant, it is contended, that, by his purchase of the right to make and vend the article within Hamilton county, he has an exclusive right to vend as well as to make, and that his right is infringed by the sales complained of; that his right is notorious, and is not only known to the defendant, but to all those who are engaged in the sales stated.

If the defendant, who manufactures the bedsteads in Indiana, be actually engaged in the sale of them in Hamilton county, it might be necessary to inquire whether this is a violation of the complainant's right. But, as this fact is denied in the defendant's answer, for the purposes of this motion, the answer must be taken as true, and that question is not necessarily involved.

The point for consideration is, whether the right of the complainant is infringed by a sale of the article within the limits of the territory claimed by complainant.

It is not difficult to answer this question. We think that the article may be sold at any and every place, by any one who has purchased it for speculation or otherwise.

There can be no doubt that the original patentee, in selling rights for counties or states, might, by a special covenant, prohibit the assignee from vending the article beyond the limits of his own exclusive right. But, in such a case, the remedy would be on the contract, and not under

In the matter of Thomas Hunter.

the patent law. For that law protects the thing patented, and not the product. The exclusive right to make and use the instruments for the construction of this bedstead in Hamilton county, is what the law secures, under his assignment, to the complainant. Any one violates this right who either makes, uses or sells these instruments within the above limits. But the bedstead, which is the product, so soon as it is sold, mingles with the common mass of property, and is only subject to the general laws of property.

An individual has a patent right for constructing and using a certain flouring mill. Now his exclusive right consists in the construction and use of this mill; the same as the right of the complainant to construct and use the instruments, in Hamilton county, by which the bedstead is made. But can the patentee of the mill prohibit others from selling flour in his district? Certainly he could not. The advantage derived from his right is, or may be, the superior quality of the flour, and the facility with which it is manufactured. And this sufficiently illustrates the principle involved in this motion.

The injunction is refused.

IN THE MATTER OF THOMAS HUNTER'S APPLICATION FOR THE
BENEFIT OF THE BANKRUPT LAW.

A demand for a trial by jury, where an application for the benefit of the bankrupt law is dismissed, must be made at the term in which the decision is made.

OPINION OF THE COURT.

THIS was an application for the benefit of the bankrupt law, to the district court. The application was dismissed.

In the matter of Thomas Hunter.

Twenty-nine days after this dismissal, the applicant demanded a jury.

On the above demand the cause was heard and continued under advisement; and at the next term the question was certified by the district court to this court, "whether a trial by jury can be allowed to the applicant aforesaid on his demand by attorney, twenty-nine days after the refusal and record thereof, of his discharge as aforesaid."

In the fourth section of the bankrupt law, it is provided, that "if, upon such hearing, a discharge shall not be decreed to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court; or he may appeal from that decision, at any time within ten days thereafter, to the circuit court," &c.

After the expiration of ten days, an appeal is not allowed; and it would seem to be reasonable that a demand for a trial by jury should be made, at the term in which the decision is made against the application. An appeal is made by entering in the district court, or with the clerk thereof, upon record, the prayer for an appeal. Now when the petition is dismissed there is a final determination of the cause, and after the adjournment of the court, no means are provided by which the cause can be reinstated and opened for a jury trial. As well might it be argued that an appeal could be taken after the lapse of the ten days allowed, as that a jury trial could be demanded after the adjournment of the court. It is true, there is no express limitation to this application, as there is to an appeal. But there is a necessary limitation to the term at which the decision of the court was entered.

This decision may be certified to the district court.

UNITED STATES v. PATTERSON.

An informer who receives one-half of the penalty on conviction is, notwithstanding, a competent witness.

This is chiefly placed on the ground of public policy.

A payment by a marshal to his assistant for taking the census in depreciated paper, is a violation of the census act of 1839. And this is especially so, where good funds had been received by the marshal, to pay his assistants.

Mr. *Anthony*, district attorney, appeared for the plaintiff.
Mr. *Hamer*, for defendant.

OPINION OF THE COURT.

THIS is an indictment under the act of the 3d of March, 1839, in relation to the census, the defendant being marshal of the district of Ohio, charging him with retaining from one of his assistants in taking the census, a portion of the compensation allowed by law for that service. The indictment contained several counts, charging the defendant with paying his assistant in depreciated paper, when he received from the government funds with which to pay them, equivalent to specie.

The defendant gave bond, as marshal, in 1838. A certified transcript from the treasury showed the transmission to him of a large amount of treasury notes, and also a draft for \$1960.17, payable at sight, on the order of the defendant, on the receiver of public moneys at Jeffersonville.

Mr. Taylor stated that he acted as assistant in taking the census for Champaign county. On the 8th of July, 1841, having received in part his compensation, he demanded of the defendant the payment of the balance. Defendant said he could not pay his assistants in treasury

notes, as they were large, but that he had made an arrangement to pay them through the banks. The witness offered to take treasury notes, but eventually received currency which was at a discount of ten per cent.

Major Hunt was present when the above payment was made, and heard the marshal offer to pay in a draft on the receiver at Jeffersonville, Indiana. Mr. Swan stated that treasury notes were worth from seven to nine per cent. above their face, for currency. Witness purchased from the marshal from five to eight thousand dollars of treasury notes, for which he paid eight per cent. in currency. The treasury notes were one per cent. better than specie.

Mr. Moody stated that the draft on Jeffersonville for specie was worth from six to seven per cent. above par in bankable money.

Mr. Espy,—cashier of the Franklin bank—the bank at that time was in a state of suspension, as to specie payments—stated that defendant had a deposit of \$35,000, which was drawn for by him and paid by the bank in currency.

The defendant took a receipt in full from the witness Taylor.

This prosecution rests on the 11th section of the above act, which provides, "that if any marshal, in any district within the United States or territories shall directly or indirectly ask or demand, or receive, or contract to receive, of any assistants to be appointed by him under this act, any fee, reward or compensation, for the appointment of such assistant to discharge the duties required of such assistant under this act, or shall retain from such assistant any portion of the compensation allowed to the assistant by this act, the said marshal shall be deemed guilty of a misdemeanor in office, and shall forfeit and pay the amount of five hundred dollars for each offence, to be recovered by suit or indictment," one-half to the informer, &c.

An objection was made to the competency of Taylor,

who was the informer, and who, should the defendant be convicted, will be entitled to one-half of the penalty.

A distinction is made between a *qui tam* action and one like the present. An informer who sues for himself as well as for the state, recovers the amount of the penalty that he is entitled to, but in the present case the informer does not receive it under the sentence on the indictment, but must sue for it. This distinction, though made in the case of the *United States v. Murphy et al.*, 16 Peters, 210, appears to me to be unsustainable. In the case cited, the court say, "The general rule undoubtedly is, in criminal cases, as well as in civil, that a person interested in the event of the suit or prosecution, is not a competent witness. But there are many exceptions, which are as old as the rule itself." One exception is, where, from the nature of the offence, there can be no conviction if the party interested be not a witness. 1 Phill. on Ev. ch. 8, sec. 7. "So cases of necessity where no other evidence can be reasonably expected, as an indictment for robbery." *Ib.* ch. 5, sec. 6, p. 120. "Another exception is, that of a person who is to receive a reward for or upon the conviction of the offender." The rule is founded upon public policy, and is sustained by the decision in 16 Peters, above referred to, and the authorities there cited. On these authorities the court think that the informer in this case, is a competent witness.

On the facts of the case the court instructed the jury, that to pay an assistant in depreciated funds, nominally calling for the true sum, but intrinsically worth seven or eight per cent. less, is a violation of the eleventh section, and subjects the defendant to the penalty prescribed. That an exchange of the government funds for currency of less value, and a payment by the marshal in such currency is clearly within the mischief, to prevent which the statute was passed.

The jury returned a verdict of guilty.

Doe ex dem. Baylor et al v. Neff et al.

DOE EX DEM. BAYLOR, ET AL. v. NEFF, ET AL.

A demise in the name of a dead man will be stricken out on motion.

And so, if the lessor of the plaintiff be dead, at the commencement of the suit.

The death of the lessor does not abate the suit. The title is supposed to be in the plaintiff.

A title acquired after the date of the demise, cannot sustain the action.

Mr. *Douglass* appeared for the lessors of the plaintiff.

Messrs. *Stansbury & Olds*, for the defendants.

OPINION OF THE COURT.

THIS is a motion to strike out the demise in the declaration laid in the name of David Meade, Jun., of Kentucky, on the ground that the said Meade was dead at the time the suit was commenced, and when the declaration was filed.

Also upon the ground that there was no subsisting title to the premises in controversy in Walker Baylor, John W. Baylor, Elijah Pritchard and David Meade, Jun. at the time of the commencement of the suit, and at the time of the service of the declaration in ejectment.

A motion was also made to strike out another demise laid in the declaration, on the ground that the lessor of the plaintiff was dead at the date of the lease.

A demise laid in the name of a dead person is unsustainable. Although the lease is now a fiction, yet the party alleged to have executed it, must be in life and capable of making such a contract. The court order the demise referred to, to be stricken out.

The death of the lessor of the plaintiff will not abate the action, nor can it be pleaded *puis darrien continuance*; because the right is supposed to be in the lessee, the plaintiff; although he cannot obtain possession of the land. Tilling-

Greathouse v. Dunlap.

hast on Ejectment, 320. But, it seems that a plaintiff in ejectment cannot recover on a demise from a person who is dead, at the time of action brought. *Lee v. Greelee*, 6 Munf. Rep. 303.

The demise laid in the name of Baylor and others must also be stricken out. A title acquired subsequently to the demise laid cannot sustain the action.

GREATHOUSE v. DUNLAP.

A plea which does not traverse the facts averred in the declaration, but sets up new matter in defence, admits the case made in the declaration.

So a demurrer to the plea admits all the facts of the plea which are well pleaded.

Want of consideration, on general principles, cannot be pleaded to a bond, nor fraud, except to the execution of the instrument.

But under the statute of Ohio, both of these defences to a sealed instrument may be made.

To an action on a bond to pay the sum that shall be recovered in a certain action then pending, between different parties, a defence cannot be set up which might have been available in the first action.

Fraud between the parties to such action might be shown.

Bail cannot go behind the judgment against the principal.

The first judgment cannot be impeached collaterally.

The amount of the judgment is as conclusive against the bail as against the principal.

On a demurrer to any pleading, the court may go back to the first fault.

A bond is good at common law, if entered into for a valuable consideration, and is not repugnant to any statute or the general policy of the law.

It does not follow that a voluntary bond is void, where an individual undertakes to do more than the law requires.

A bond is void which shows upon its face an illegal consideration.

Every plea in discharge or in avoidance of a bond, should state particularly the matters of discharge or avoidance.

Where a bond is required in restraint of liberty, which the law does not authorise or require, it is void.

But, in such a case, the facts must be specially alleged. They cannot be presumed.

Matters which make a deed void may be given in evidence, under the general issue of *non est factum*.

But matters in avoidance must be pleaded.

Greathouse v. Dunlap.

Taft & Key, for plaintiff.

Hamer, for defendant.

OPINION OF THE COURT.

THIS action of covenant is founded on the following instrument: "Whereas, there is now depending in the Mason circuit court, in the state of Kentucky, an action at common law, in which William Greathouse is plaintiff and John B. Mahan is defendant, in which the said Mahan has been and is confined in the jail of Mason county for want of special bail; and it is agreed by the said William Greathouse to discharge him from custody on condition that William Dunlap, of Brown county, in the state of Ohio, shall enter into this bond. . Now, therefore, I, the said William Dunlap, do by these presents bind and oblige myself, my heirs, &c. that in case the said William Greathouse shall finally succeed in the said suit against the said John B. Mahan, that I, the said William Dunlap, will pay the amount of the recovery so finally had in the said suit against him the said Mahan, including all legal costs, dated the 22d of November, 1838."

In each count it is averred, that on this bond being given Mahan was released from his imprisonment, and that in the case then pending there was recovered against Mahan the sum of sixteen hundred dollars in damages.

A special plea to the declaration was filed, which avers, "that the above bond was obtained by the fraud of Greathouse, in this, that on the 13th of August, 1838, at a circuit court held in the county of Mason, and state of Kentucky, he falsely and fraudulently procured a bill of indictment to be found a true bill by the grand jury then and there sitting against the said Mahan, charging him with aiding and assisting a certain slave, named John, the property of said Greathouse, to make his escape from his possession, to the state of Ohio, on the 19th of June, 1838, whereby the said

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Greathouse lost his said slave; that on the 22d of August, 1838, he made oath before a justice of the peace that the said Mahan was a resident of the state of Ohio; which oath, on being presented to the governor of Kentucky, a demand was made of the governor of Ohio, for the surrender of Mahan as a fugitive from justice, &c.; that he was surrendered through the procurement of the said Greathouse, and was committed to the jailor of Mason county aforesaid; whilst so imprisoned a civil suit was instituted against him by the said Greathouse, and upon such civil process issued the said Mahan was imprisoned in the said jail; and he avers that he was not guilty of the charges in the indictment, and was not a fugitive; that for fifteen years he had not been in the state of Kentucky; that the governor of Kentucky had no right to demand, nor the governor of Ohio to surrender him, &c.; that the surrender and demand were procured by the false and fraudulent misrepresentations of said plaintiff, made by him for the express purpose of removing said Mahan to Mason county, Kentucky, and confining him in prison, to enable him to harass and oppress said Mahan, and to induce his friends to become responsible for the unjust and unfounded claim set up by him against said Mahan, in and by said suit. All which was known to the said Greathouse before the finding of the indictment, the making of the affidavit, and the fraudulent procurement by him of said demand, arrest and imprisonment of said Mahan. That the bond was signed solely to release the said Mahan from said unjust and fraudulent imprisonment, so procured by said Greathouse in manner aforesaid. And therefore he avers the writing obligatory is void at law," &c.

To this plea the plaintiff filed a general demurrer.

No issue is tendered to the declaration by the plea. It sets up new matter in bar to the case made in the declaration, and, of course, admits its allegations. So the

demurrer to the plea, admits all the facts which are well pleaded.

The plea sets up fraud in the consideration of the bail bond, on which the action is founded, and this, it is insisted, cannot be pleaded to a sealed instrument. The want of consideration cannot be alleged to a bond, on general principles, nor can fraud be pleaded, except to the execution of the instrument. *Reynolds v. Rogers*, 5 Ohio Con. 110; 2 John. Rep. 177, 179; 13 John. 430; 8 Wend. 615, 618; 9 Cowen, 307, 311, 314.

But the statute of Ohio, of the 24th of February, 1834, (Swan's Stat. 685,) provides, that a failure or want of consideration of a sealed instrument may be pleaded. Under this statute a fraudulent consideration may be shown, as that would be one mode of showing a failure of consideration.

The condition of the bond is, that Dunlap, the defendant, will pay the amount which Greathouse shall recover against Mahan, in a suit then pending in the circuit court of Mason county, Kentucky. On giving this bond, Mahan was released from his imprisonment in that suit. A judgment against Mahan was recovered, and the question is, whether the defendant can go behind that judgment.

There can be no doubt that he might show collusion between Mahan and Greathouse; but this is not pretended. Can he go into matter of defence which it might have been proper for Mahan to have set up in the former action, and which he failed to do? Mahan, by his counsel, defended that suit; but the matters of fraud now pleaded by the bail were not relied on in the defence. Can these matters be now examined, in an action on the bail bond. If fraud had been established in the action against Mahan, no judgment could have been had against him. The plea avers a fraudulent proceeding by Greathouse, in procuring the bill of indictment, the demand of the governor of Ken-

tucky, the order of surrender by the governor of Ohio, the imprisonment of Mahan in Mason county, Kentucky, all done for "the express purpose of removing said Mahan to Mason county, Kentucky, and confining him in prison, to enable the said Greathouse to harass and oppress said Mahan, and to induce his friends to become responsible for the unjust and unfounded claim set up against him in and by said suit."

The plea is less definite, than it should have been, in charging the fraud in the civil suit; but it is not important to dwell on that point. The part of the plea above cited does, though not in very technical language, so charge the fraud. Whatever grounds there may be for the averments of the plea, there can be no doubt, they should have been set up by Mahan in the suit against him. The fraudulent acts were done against Mahan, and not against his bail. And as Mahan did not avail himself of these acts in his defence, although he acted in good faith towards his bail, can the bail now plead them? If the bail may go behind the judgment against his principal, on one ground, to show that it was unjust, may he not do so on every other ground? Must the original plaintiff, in his action against the bail, be prepared to show the grounds on which his judgment against the principal was obtained? In such a case, does the original case stand open on its merits, as it stood in the first action? This would be to regard the judgment as nothing, not even *prima facie* evidence.

As regards the amount of the judgment, it is as conclusive against the bail as against the principal. It is final and conclusive between the parties, and it can be considered in no other point of view, when it is brought collaterally before the court, in an action against the bail.

There are many conflicting decisions as to how far the admissions of the principal shall bind his surety. One class of cases holds that the acts and admissions of the

principal, which constitute a part of the *res gesta*, will bind the surety, whilst another considers them binding beyond such limitation.

However courts may have differed as to the effect of the admissions and acts of principals in binding their sureties, none have doubted that special bail are bound by the judgment against their principal. And on the same principle, the bail must be bound in all cases where they undertake to pay, as in the case under consideration, the judgment that shall be obtained against their principal. If this be so, the plea in this case cannot be sustained. It not only goes behind the judgment in the case where the bail became bound, but the fraud in a prior and criminal case, is also alleged with the attending circumstances. This is not admissible by any known rule of pleading.

But it is argued that the demurrer brings in review the declaration, in which the bond is copied at length, and by which its validity must be considered. It is true, that a demurrer, without regard to the party who has filed it, authorises, and indeed requires, the court to notice the first defective pleading. In the first count of the declaration the bond is copied, and in the other two its terms are substantially stated, and the signature of the defendant.

It is admitted that this is not a statutory bond, but it is important to see what provision the statutes of Kentucky have made in regard to appearance bail, and the extent of their liability.

By the act of the 17th December, 1821, Morehead & Brown's Stat. 195, 'to abolish imprisonment for debt,' &c., it is declared in the first section, "that all laws which authorise an execution against the body of the debtor are repealed." The 2d section provides that, "to entitle the plaintiff to bail on mesne process, he must swear that he verily believes the defendant will leave the commonwealth, or move his property out of the same before judgment," &c.

By the act of the 29th January, 1829, it is declared in the first section, "that when any person shall hereafter be held to bail in any civil action, according to the laws now in force, the undertaking of the bail shall be, that the defendant shall not remove his effects out of the commonwealth until the plaintiff's judgment, if one shall be recovered, is discharged."

On the return of an execution, "no property found," under the second section of the same act, "a *sci. fa.* may issue suggesting that the defendant has removed his property out of the commonwealth." In *Peteet v. Owsley*, 1 J. J. Marsh. 55, it was held, "that bail, who entered into the recognizance after the act of 1821, abolishing the *ca. sa.* could not be made liable; for the bail could never be subjected to answer the debt or damages without a *ca. sa.* against their principal." But the remedy under the act of 1829 was referred to, where the recognizance had been taken as required by the statute.

By the act of the 15th of January, 1827, the *ca. sa.* is revived in actions of trespass, *vi et armis*, in the action of trespass on the case, for words spoken or written, or for seduction.

On the 29th of February, 1836, 3 Dig. 727, Stat. 58, a statute was passed, requiring the plaintiff to give bond and security, payable to the defendant, in a case where bail is required, "conditioned to pay all costs and damages which the defendant shall sustain, by the wrongful suing out the writ."

And in the 2d section the same act provides, "that persons having no known place of residence in the commonwealth may be held to bail in any county in the state where they may be found."

The bond required to be given by the plaintiff, as above, was given in this case.

Whether the above act of 1836 has been so construed

by the courts of Kentucky as to create a new liability by a defendant "who has no known residence in the commonwealth," does not appear. There is no reference to any such decision, in the Digest referred to, which was published in 1842. The affidavit filed by Greathouse, and on which bail was required, states, "that he verily believes the said Mahan will leave the commonwealth or move his property out of the same before judgment, or otherwise abscond," &c. As this oath conforms to the act of 1821, the application for bail is presumed to have been made under that act, and not under the act of 1836. If this be so, the special bail to which the plaintiff was entitled under the act of 1829, was "that the defendant should not remove his effects out of the commonwealth until the plaintiff's judgment, if one shall be recovered, shall be discharged." From the words of that statute, it would seem, that the form of bail, &c. was where it was required "under laws now in force." So that a subsequent law requiring bail to be given in a case which was not required to be done before, might not come under the act of 1829.

From the proceeding in this case, as well as the words of the act of 1836, it is supposed that it has not been considered as affecting the conditions of the bail bond or recognizance under the act of 1829.

The validity of the bond is rested by the plaintiff's counsel on the common law, and not on the statute.

In *Stratton v. Rowan*, 2 Bibb, 199; *Cobb v. Curtis*, 4 Lit. Rep. 235; *Stephenson v. Miller*, 2 Lit. Rep. 306; *Fant, &c. v. Wilson*, 3 Mon. 342; *Hay et al. v. Rogers*, 4 Mon. 225; *The People v. Collins*, 7 John. Rep. 554, it is said, "that replevin and other bonds, required by statute, have frequently been decided by the court to be valid common law obligations, when not executed according to the statute." "And that the general rule is, that a bond, whether required or not by statute, is good at common law, if entered into volun-

tarily and for a valid consideration, and if not repugnant to the letter or policy of the law." 2 J. J. Marsh. 418. 3 Ib. 437.

In *Justices of Christian county v. Smith*, 2 J. J. Marsh., it was held that "a bond for the construction of a bridge, made payable to the justices of the county, when the statute required it to be made payable to the commonwealth, was good at common law." The court say, "but as there is no statutory provision, making such a bond void, and the subject matter is such as the parties had a right to contract about, the bond is valid." And again, in 3 Mon. 392, the court say, "it is not necessary that the condition of an appeal bond should be in the form prescribed by the act of the legislature; if it have the same legal effect, it is sufficient."

In the case of the *Postmaster General v. Early*, 12 Wheat. 136, the court held a bond given by a postmaster to account, &c. was valid, although there was an express law requiring the bond to be given.

In the *United States v. Linn et al.*, 15 Peters, 315, the court held that a receiver of public money having given an instrument in the form of a bond, but without seal, bound the sureties, and was valid, though the act of Congress required a bond to be given.

There are many other cases which might be referred to, in which voluntary bonds, which have not pursued the requisites of the statute, have been held valid as common law instruments; and also where they have been given without any express authority of law. If the subject be one about which the parties may lawfully contract, it being neither against any law or public policy, and a consideration has passed, courts have sustained and enforced such a contract. And it is insisted that such is the nature of the bond under consideration.

It is said not to be inhibited by any law, and that the act of giving the bond should be construed as favorable to

liberty, as through its means, Mahan was liberated from his imprisonment.

On the other hand it is contended that the bond was against the policy of the law. That final process against the body of a defendant, except in two or three cases, having been abolished, special bail was only to be bound that the property of the defendant should not be removed out of the commonwealth. That the bond in this case having been given for the payment of the judgment which Greathouse might recover, being a greater obligation than the law required, must be held as against its policy, and consequently void.

It does not follow that the voluntary bond of an individual is void, who undertakes to do more than the law requires. As, for instance, where no bond is required by a disbursing officer, and yet where one has been given, it has been held valid. And so where a bond does not pursue the precise form of the statute, it is good at common law.

Where a bond has been given for a gambling debt, or on a sale of lottery tickets, the sale of which is prohibited, and the consideration appears on the face of the instrument, or is shown by plea, it is void. But this is not the case where the consideration does not arise out of an illegal and prohibited act. There is a class of contracts, which tend to a breach of the peace, the violation of good morals, &c., though not prohibited by law, are, nevertheless void. But these belong to a different class from the one under consideration.

In the case of the *United States v. Tingey*, 5 Peters, 125, where a bond was given by a purser in the navy, which contained conditions beyond what the law required, the court considered the instrument, having been voluntarily given, as valid at common law. That bond, the court say, "was not limited to the duties or disbursements of Deblois, as purser, but creates a liability for all moneys received by

him, and for all public property committed to his care, whether officially as purser or otherwise." The law required the bond for the faithful discharge of the duties as purser.

But in another part of the case the court, in considering the fifth plea, say that it was a complete answer to the action. "That plea, after setting forth at large the act of 1812 respecting pursers, proceeds to state that before the execution of the bond, the navy department did cause the same to be prepared and transmitted to Deblois, and did require and demand of him that the same with the condition, should be executed by him with sufficient securities, before he should be permitted to remain in the office of purser, &c., and that the condition is variant, &c. from the act of Congress," &c. Under this plea, the court say, "there is no pretence to say that the bond was voluntarily given, or that though different from the form prescribed by the statute, it was received and executed without objection."

And in the case under consideration if the defendant in appropriate terms had set out the imprisonment of Mahan under the civil process, the acts of Kentucky which require special bail to be given with the condition only, "that the defendant should not remove his property out of the commonwealth, until the judgment, if one should be obtained against him, should be satisfied;" and the plaintiff refused to liberate him until he procured the bond of the defendant, for the absolute payment of the judgment, should one be obtained against Mahan, it would have come, if the facts had been admitted by a demurrer, within the principle of the case of the *United States v. Tingey*. It would then have appeared that the bond was not voluntarily given, but had been illegally coerced by Mahan's imprisonment.

Now it is difficult to say that the bond under considera-

tion, bears upon its face any higher evidence of its having been given against public policy or the policy of the law, than the bond of De Blois and sureties. In both cases the law pointed out what kind of an instrument should be given, and in both instances the bonds were given containing conditions, imposing a greater obligation than the statute imposed, and yet the court held, the purser's bond, being voluntary, was valid at common law. What is there in the facts of the two cases, which should make them differ in principle. In the one case the liberty of a citizen was concerned, and in the other the rights of a public officer. There was oppression under color of office, in one instance, and in the other, through the process of the court.

In *United States v. Bradley*, 10 Peters, 343, some points were ruled which also have a bearing on the case under examination. That was an action brought on a paymaster's bond, which did not conform to the words of the act of Congress under which it was given. And it was contended that as the conditions of the bond were prescribed, and no authority to take a different bond, there was a prohibition from so doing. But the court say, "upon the face of the pleadings, this must be taken to be a bond voluntarily given by Hall and his sureties. There is no averment that it was obtained from them by extortion or oppression, under color of office, as there was in the *United States v. Tingey*." "All the pleas assert, in substance, is that Hall never gave any such bond as is required by the act of 1816," &c. "Now, (the court say,) no rule of pleading is better settled, or upon sounder principles, than that every plea in discharge or avoidance of a bond, should state positively and in direct terms, the matters of discharge or avoidance. It is not to be inferred, *arguendo*; or upon conjectures." And they further remark, "it may be added,

that the bond is not only voluntary, but for a lawful purpose, viz: to insure a due and faithful performance of the duties of paymaster."

Now what is there upon the face of the bond before us, which shows it to be illegal? Mahan was in prison, and was released on the bond being given by the defendant. It may be that the defendant preferred giving such a bond as he did give, to the one required by the statute; and under such circumstances, would not the bond be valid? As was remarked in the argument, the law did not prohibit such a bond, or declare, if given, it should be void. The bond is not in violation of public policy; for any man may agree to pay the debt of another. If then it was voluntarily given, as must be presumed, unless the contrary appear, and the condition on which it was given was performed by the obligee, it is not perceived how the bond can be held invalid.

If the bond was exacted as a condition to the release of Mahan, and the law authorised no such exaction, and the defendant, through the influence of Mahan, was induced to give the bond, it might not be considered a voluntary bond. But these facts must be set up by plea—they cannot be presumed.

The special plea having been disposed of, the case stands as though a general demurrer had been filed to the declaration. And viewing the case under this aspect, the bond must be considered as having been given voluntarily and on a condition performed. Under such circumstances, it is not perceived on what principle the bond can be considered void. Mahan being imprisoned by due process, neither his release, nor the consideration which procured it, would seem to be against public policy.

The rule is, "that, while matters which make a deed absolutely void, may be given in evidence under *non est factum*, those which make it voidable only must be specially

pleaded. Com. Di. Pleader, 2 W. 18. And it seems that in general, objections to the legality of the consideration on which a deed was founded are referable to the latter class; for it has been decided, that where a condition of a bond is in restraint of matrimony, that ground of defence is not evidence under *non est factum*. *Cotten v. Goodridge*, 2 Black. 1108, And that where a bond is given to compound a felony, that is matter which must be specially pleaded. *Hosmer v. Rowe*, 2 Chit. Rep. 334; 2 Stark. 36, S. C. And it is a general rule that "any illegality arising from the prohibition of an act of parliament, as in case of usury or gaming, is matter for special plea."

These authorities are cited, not to show what may or may not be given in evidence under the general issue, but to illustrate the principle, that where matter is set up in avoidance of a bond, it must be pleaded. Where the illegality appears upon the face of the instrument, it may be taken advantage of by general demurrer, in arrest of judgment, or by a writ of error.

The demurrer to the special plea is sustained.

Judgment, &c.

SAMUEL BOOK, IN BANKRUPTCY.

A formal plea in bankruptcy is not necessary nor usual, and, if filed, will be treated as a motion.

An infant is entitled to the benefit of the bankrupt act.

The proceedings may be had in his own name.

The bankrupt law relieves against a judgment for a tort.

Any one interested in the administration of the effects of the bankrupt may object, though technically he is not a creditor.

Messrs. Shannon & Carroll appeared for the bankrupt.

OPINION OF THE COURT.

THE following points have been certified to this court from the district court, under the bankrupt law.

1. "Whether a plea in abatement is a regular and authorised form of opposition to a petition in bankruptcy, and whether the motion filed in the above case to strike out such plea ought to prevail."

Formal pleading in such a case is not usual or necessary; but there is no reason why the objection should not be so stated. The form of the objection may be governed by the discretion of the party making it. The plea should be treated merely as written objections.

2. "Whether the infancy of the applicant is good grounds of opposition to his discharge as a bankrupt."

An infant is bound to pay certain debts. The bankrupt law extends its benefits to all persons who are in a state of bankruptcy, without exception as to persons; fiduciary debtors only are excepted. An infant, therefore, may claim the benefit of the bankrupt law. When an infant brings his case within the bankrupt law, the law vests his property in the assignee.

3. "Whether the fact of the applicant's being a minor, petitions in his own behalf and in his own name, and not by his next friend, is a good ground of opposition to his discharge as a bankrupt?"

If an infant be a proper subject of the bankrupt law, it would seem to follow that he may make application in his own name.

4. "Whether a judgment in a court of law obtained in an action of tort, is a debt dischargeable under and by force of the bankrupt law?"

As the law makes no exception as to debts, except those of a fiduciary character, the discharge is from all other debts.

5. "Whether a creditor who has not proved his debt, and is not otherwise interested as a creditor in the proceedings in bankruptcy, can appear and contest the right of the applicant to his discharge?"

By the 4th section of the bankrupt law, "notice to all creditors who have proved their debts, and other persons in interest, to appear to show cause why such discharge and certificate shall not be granted," is required.

In the matter of *Brown King*, Southern District of New York, 5 Law Reporter, 320, it was held, "that the terms, 'other persons in interest,' used in the 4th section, are employed to designate those who could not prove debts as creditors, and does not embrace, but excludes creditors."

That these words may embrace those who are not properly creditors, but have an interest in the matter, may be admitted; but that they exclude creditors who have not proved their debts, is a gratuitous assumption not warranted by law. In the Law Reporter, 5 vol. 263, Justice Story says, in reference to this clause, "if the objectors in that case are not strictly creditors of the bankrupt, they are at least equitably creditors, and have an interest in the property to be administered in bankruptcy."

The above answers may be certified to the district court.

LESSEE OF NELSON v. MOON ET AL.

Parties in chancery, or at law, may waive process and appear.

Regularly a notice should be served on infants, where the court appoints a guardian *ad litem*, and for this defect a judgment or decree may be reversed by a superior court.

But this objection cannot be taken collaterally.

When a record is used as evidence, presumptions are always favorable.

The court of common pleas had power to take jurisdiction of a bill for partition in two counties.

But, to affect purchasers, the decree must be recorded in the county where the land lies.

Where a tract of land is lost in whole or part, the patent may be cancelled, under the act of Congress.

The act under which this is done is remedial in its character, and just.

It is exerted only on the application of those who have lost land by a paramount title.

A patent for land covered by a paramount title does not vest the fee in the patentee.

Mr. *Thompson* appeared for the lessor of the plaintiff.

Mr. *Foot*, for the defendants.

OPINION OF THE COURT.

THE facts in this case being admitted, it is submitted to the court without the intervention of a jury. The defendants pleaded the general issue, and under the rule of court have specified by metes and bounds the various tracts of land which they claim, and of which they have possession.

A patent issued to Breckenridge for the land in controversy, and other tracts, the fifteenth of February, eighteen hundred and three, in all amounting to seventeen hundred and sixty-six and two-thirds acres. Robert Campbell was the owner of the warrants on which the locations were made by Breckenridge in his own name, and for which he was entitled to a moiety of the land. In 1833, Campbell

filed his bill in the court of common pleas for Brown county, against the heirs of Breckenridge, setting up the contract of location, and praying a conveyance of a moiety of the land, and partition. Answers were filed, and a decree for a title and partition was made.

In 1831, the patent to Breckenridge was surrendered, and a new patent issued to the heirs of Breckenridge and Robert Campbell, for thirteen hundred and thirty-five and two-thirds acres—to Robert Campbell, in proportion of five hundred and thirty-eight to the whole tract.

Prior to the issuing of the new patent, Campbell had conveyed to the defendants all his interest in the land, except one hundred and seventy acres, which he subsequently conveyed to St. Clair.

By these conveyances the plaintiff contends, the defendants have acquired possession of more land than Campbell was entitled to, and this is the ground of controversy.

Several questions on the foregoing facts have been raised and discussed.

The plaintiff contends, the proceedings before the court of common pleas of Brown county were void, for the following reasons :

1. There was no service of process on the parties.
2. The answers are not sworn to.
3. The land of which partition was made was situated in Brown and Clinton counties, over which the common pleas of either could exercise no jurisdiction.

As to the service of process. George C. Light was appointed guardian *ad litem* to two of the defendants, who were minors; and Mr. Collins, of counsel for the defendants, filed all their answers.

Defendants in chancery, as well as at law, may waive process and appear; and this having been done in good faith, they are as much in court, and as much bound by its proceeding, as if they had been regularly served with

process. But it is said that infants cannot waive process. The two infant defendants appeared by guardians *ad litem*, and it is objected that this was done without a notice having been served on the infants.

If it be admitted, that for this defect in the proceeding the supreme court would have reversed the decree, yet it does not follow that the decree, when collaterally used, can be treated as a nullity. There was an appearance by a guardian specially appointed by the court to defend the suit, and the presumption will be in favor of the proceeding and not against it, when used as evidence. A judgment or a decree may be treated as a nullity, if it appear from the record that there was neither a service of process nor a waiver of it. But in the present case there was an appearance according to the forms of law, and that gave jurisdiction to the court. The objection, at most, is to an irregularity, which might be ground of reversal, but does not show a want of jurisdiction in the court. And this must be made clearly to appear, before the decree can be treated as a nullity.

The answers were not sworn to, but they were treated as sworn answers by the complainant in that suit, and an objection cannot now be made on that ground. Had an exception been filed to the answers for this cause, they would have been set aside; but no exception being taken, it was waived, and the decree can in no sense be affected by this omission. No doubt the pleadings were made up by consent.

A part of the land was situated in Brown county, where the bill was filed; and this gave jurisdiction over the land in Clinton county. If the decree of partition were not recorded in Clinton, within the time limited by the statute, the rights of a purchaser were not affected by it. But, as between the parties to the decree, it was valid under the statute.

Was the first patent cancelled? This is the great question in the case.

The act of the 13th of May, 1800, provides, "that in every case of interfering claims, under military warrants, to lands within the Virginia military tract, when either party to such claims shall lose or be evicted from the land, every such party shall have a right, and hereby is authorised, to withdraw his, her or their warrant, respectively, to the amount of such loss or eviction, and to enter, survey and patent the same, on any vacant land within the bounds aforesaid, and in the same manner as other warrants may be entered, surveyed and patented."

The surveyor of the district certified, that four hundred and thirty-one acres of the land patented to Breckenridge were lost by a prior entry. That of the land decreed to Campbell, one hundred and eighty-one acres were lost. This certificate bore date the 1st of December, 1830.

The original patent was returned to the land office, on which the following indorsement was made. "Cancelled, 431 acres of land lost by a prior claim, as patented on the new survey, No. 3045, will be issued for 1335½ acres. The parties, R. Campbell, and the heirs of Breckenridge, claim scrip for the 431 acres lost by prior survey. December, 1831." And lines of the pen were drawn across the patent.

The commissioner of the general land office states, "that where a tract of land, which had been patented, was lost in whole or in part, it was the practice of the land office to cancel the patent," as was done in this case.

It is objected, that the law does not authorise the cancellation of the patent. It does not in terms, but such is the practice of the department, and it would seem to be a reasonable and proper practice, and one which, if not required by the words of the act, is fully justified by its substance and spirit.

This, it is contended, would vest in the treasury depart-

ment a very dangerous power. How is the power a dangerous one? It is treated as a power exercised against the rights of the original patentee. But such is not the character of the act. It is remedial, and only operates in cases where the person in interest makes special application for relief. Having lost his claim by a paramount title, in whole or in part, he obtains other lands from the government. The government might have withheld this relief. For a person who holds a Virginia land warrant, is bound to select vacant land, and if, through negligence, or want of knowledge, he locates his warrant on lands previously appropriated it is his own fault, and the government, strictly, is not bound to relieve him. But he is relieved by the above act, and it is just, and the act is fraught with no danger to the citizen.

But it is said by the patent the fee passes out of the government to the patentee, and that this cannot be divested except by a judicial decision. But the fact assumed here as to the fee is not true, and never can be true in an equitable sense. It is in fact only in cases where the patent does not convey the title, as the face of it purports to do, that relief under the act is desired. For it is only where the title, in whole or in part, is inoperative, that relief can be asked. And is it not strange that this should be considered a dangerous power?

As the evidence on which the government acts under this law, and the mode by which the power is exercised, seems to be within the executive power to determine, it is not competent for the judiciary to prescribe the forms in which any executive power shall be exercised. It may determine whether such a power has been legally exercised. The action of the executive in the case must be considered *prima facie*, if not conclusive. If there has been fraud to the injury of third parties, it may be shown, and the proceeding may be held void. But there is no pretence

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of fraud. The cancellation of the patent must be held to have been for the benefit, as it was at the instance, of the parties interested.

From this view of the case, the lessor of the plaintiff, under the patent, has a legal right of recovery. Whether the defendant may not set up an equitable right under the partition, is not now before us.

UNITED STATES v. HILLIARD & CLARK,

A treasury transcript, to be evidence, must contain the original items of the accounts or balances admitted by the defendant in his official returns.

The court can only revise the action of the treasury, by looking at the evidence on which the treasury acted.

A balance, therefore, struck by the treasury, cannot, as such, be charged, and made evidence.

Where a person is charged by the defendant, through the agency of a third party, the evidence on which such charge was made must be stated.

The *District Attorney* appeared for the plaintiffs.

Mr. *Swayne*, for the defendants.

OPINION OF THE COURT.

THIS is a writ of error from the district court. The action was brought against the defendants as sureties of D. Worly, late postmaster and agent, at Cleaveland, Ohio. The bond signed by the defendant contained conditions, that "the said Worly should well and truly execute the duties of postmaster according to law and the instructions of the postmaster general, &c.; and should also do as agent all that might be required of him, and should account, in the manner directed by the postmaster general, for all monies which he might receive as agent," &c.

The breach assigned was, that, as postmaster and agent, he had received thirty thousand five hundred and eighteen dollars and twenty-six cents, and also divers other sums, &c.; and has not paid over, though often requested, according to the condition of said writing obligatory, any part of said sums of money so received.

On the trial, the defendants objected to so much of the statement A. offered in evidence as relates to the quarterly accounts rendered by the late postmaster, unless those accounts or certified copies were produced.

Objection was also made to so much of said statement as relates to moneys received by Worly, as agent from other postmasters, unless the original papers on which the charges were made, or certified copies, were produced. Which objections were overruled by the court, and to which decision the defendants excepted.

Balances struck by the treasury department, and charged as such, are not evidence. The items of the account on which the balance was ascertained should be stated in the treasury transcript. But balances charged against himself, by a postmaster or other officer, may be charged against him. For this takes the admission of the officer solemnly made in his accounts.

An appeal, in effect, is given from the treasury decisions to the courts, and the courts cannot revise these decisions unless they shall have before them the evidence on which the treasury acted. This point has often been ruled by the supreme court. *Lawrence v. United States*, 2 McLean's Rep. 581. The balances charged, in the account objected to, against Worly as postmaster, do not appear to be such as were charged by him against himself, but such as were made out by the corrections of the department. Now the ground on which these corrections were made should be stated in the transcript.

It also appears that the late postmaster is charged as

Nelson & Graydon v. Cutter & Tyrrell.

agent, or sub-treasurer, with two items, monies received from postmasters, and no receipt or evidence is shown on which the charge is made.

Where an officer is charged with the receipt of money which is not acknowledged by him in his returns, or was not regularly paid or advanced to him by the department in the ordinary course of its business, the evidence on which the charge was made must be stated. The receipts of Worly for these sums must be exhibited, or copies of them, if filed in the department, must be certified, or some other legal evidence must be exhibited on which to charge Worly, in order that his sureties may be made liable.

On the two points above stated, the judgment of the district court must be reversed.

AT CHAMBERS, APRIL 10, 1844.

NELSON & GRAYDON v. CUTTER & TYRRELL.

An affidavit to hold to bail must be positive as to the indebtedment.

The opinion or belief of the affiant is insufficient.

On a habeas corpus the court will inquire whether the *capias* was rightfully issued.

And this involves the sufficiency of the affidavit.

Messrs. *Fox & Howard* for plaintiffs.

Messrs. *Walker & Carey* for defendants.

OPINION OF JUDGE McLEAN.

THE defendants were arrested on a *capias ad respondendum*, founded upon the following affidavit :

THE UNITED STATES OF AMERICA, }
DISTRICT OF OHIO. }

“I, William A. Woodward, of the city and state of New York, being duly affirmed, depose and say, that Nelson & Graydon are merchants, residing in the city and state of New York, and that I am informed and verily believe, that the said Amos Cutter and Jacob Tyrrell, partners, trading and doing business under the firm of Cutter & Tyrrell, are citizens of the city of Cincinnati, in the state of Ohio, and that the said Cutter & Tyrrell are justly indebted to the said Nelson & Graydon, in the sum of eleven hundred and twenty-five dollars and four cents, by virtue of a promissory note described in the foregoing precipe, exclusive of all offsets; which said promissory note was given for goods and merchandise, sold by the said Nelson & Graydon to the said Cutter & Tyrrell; and I do further depose and say, that I verily believe said Cutter & Tyrrell are about to convert their property into money for the purpose of placing it beyond the reach of their creditors; that they have property and rights in action, which they fraudulently conceal; and that they have disposed of, and are about to dispose of their property, with intent to defraud their creditors. And I do further depose and say, that my opinion is founded upon statements and information given to me by the said Cutter & Tyrrell, themselves, and on examination of their books and accounts, and information of individuals residing in the neighborhood of the said Cutter & Tyrrell: and I do further depose and say, that I am acting in this matter as the agent of the said Nelson & Graydon.”
Signed, W. A. Woodward, which affidavit is duly certified.

The counsel move for the discharge of the defendants on two grounds.

1. Because the facts are stated by the affiant, from his information and belief.

2. Because he does not state that he was the authorised agent of the plaintiffs.

On the part of the plaintiffs it is insisted, that on the habeas corpus the court cannot go behind the *capias* and inquire into the sufficiency of the affidavit.

If this were a regular term, it would only be necessary to bring the sufficiency of the affidavit before the court, to move for the discharge of the defendants. But, in vacation, the defendants are brought up on the present writ, to enable me to inquire into the cause of their detention. The writ on which the arrest was made is produced by the gaoler, but that writ, unsupported by an affidavit, did not authorise the arrest. Indeed it cannot legally be issued without an affidavit. The affidavit, therefore, is so connected with the writ, as to constitute an essential part of it. Separate it from the writ, and the defendants must be discharged. The personal liberty of the defendants is concerned, and in such a case a presumption does not arise against that liberty.

By the third section of the act of this state, to abolish imprisonment for debt, it is provided, that if any creditor, his authorised agent or attorney, shall make oath or affirmation in writing, &c. that there is a debt or demand justly due to such creditor, of one hundred dollars or upwards, specifying, as nearly as may be, the nature and amount thereof, and establishing one or more of the following particulars:

1. That the defendant is about to remove his property out of the jurisdiction of the court, with intent to defraud his creditors: or,

2. That he is about to convert his property into money for the purpose of placing it beyond the reach of his creditors, &c. &c.

This affidavit was not intended to be a mere formal

matter. The debt must be positively stated to be justly due. Not that it is due in the opinion or belief of the witness from an examination of the account or the written instrument on which the action is founded. If something more than this evidence of indebtedment were not required, a *capias* would have been given without an affidavit.

Under an Indiana statute, containing similar provisions to the above, the supreme court held, "in actions on contract, the affidavit, whether made by the plaintiff himself, or by a third person, must show that there is, at the time of suing out the writ, an existing debt actually due, for which an arrest may be lawfully made. It must be positive as to the sum due, and not as the deponent believes, nor as appears by an account stated," &c. *Lewis v. Brackenridge*, 1 Blackf. 112. A similar decision was made by the circuit court in the district of Illinois. *Wright et al. v. Cogswell*, 1 McLean's Rep. 471.

The agency of the affiant is sufficiently shown. The defendants are discharged.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—MAY TERM, 1844.

SHIRLY v. HARRIS.

An agreement to pay ten per cent, if a certain note, given some time before, should not be paid punctually when due, is without consideration, and cannot be enforced.

But where in such agreement the maker of the note bound himself to pay the note to him in Missouri, the residence of the payee, and in the event of failing to pay, that he would pay the expenses of the payee in coming to Indiana to collect it, may be enforced.

The consideration arises from the expense incurred, by reason of the default of the maker of the note.

Fletcher & Butler for plaintiff.

Wick & Barbour for defendant.

OPINION OF THE COURT.

THIS action is brought on a sealed obligation in which was recited, that "the defendant had given a joint note with Beverly Wallace for the sum of \$400 payable to the plaintiff, or order, on 3d October, 1842, dated December, 1840." And the defendant covenanted that the money should be paid to the plaintiff, in Missouri, at his residence, when due, or he would pay ten per cent. interest and the expense of plaintiff in coming to Indiana for the money. And the plaintiff averred that the money was not paid, and the expenses in coming for the money is averred, &c.

Shirly v. Harris.

The defendant pleaded, 1. *Nil debit*; and, 2. That the instrument was given voluntarily and without consideration.

To the first plea the defendant demurred. The demurrer must be sustained. By his deed the defendant is estopped from saying that he is not indebted.

The plaintiff tendered an issue to the second plea.

A statute of Indiana authorises the second plea. The plaintiff proved to the jury that the money not being paid when due, the plaintiff came from Missouri to Indianapolis to collect it; and he proved the amount of his expenses.

It is not pretended that this contract was not a *bona fide* one. It was entered into fairly, and the only question which is raised, is, whether it is legal and can be enforced.

As regards the ten per cent. we think it cannot be recovered. There was no consideration to support the obligation. Six per cent. is the legal rate of interest in Indiana, though a higher rate, not exceeding ten per cent. will be valid, if agreed to be paid in writing.

The note on which this interest was to be paid had been given, before the date of the agreement on which this action is brought.

There is no consideration then, for the payment of the ten per cent. interest. It was a voluntary undertaking, and cannot be enforced. But, that part of the agreement which regards the expenses of the plaintiff, is not without consideration. By the note he was bound to pay the money at the time stipulated, and if he failed to do this, and the plaintiff was under the necessity of making a trip to Indiana, he bound himself to pay his expenses. Here is an expense incurred, by reason of the default of the defendant, and which he agreed to pay. We see no principle which forbids such a contract, it being *bona fide*, and the jury will find for the plaintiff such expenses as the plaintiff incurred on the trip and has proved.

FOLLETT'S HEIRS v. C. ROSE.

An action of disseisin is authorised and regulated by the statute of Indiana.

Where there is doubt whether an instrument has been sealed, the fact is properly referable to the jury.

Persons acquainted with parchment patents may be examined as to the traces of a seal. If it was the intention of the grantor to seal the instrument, any forcible indentation on the parchment, though it be not wax, wafer or a scrawl, may be a seal.

The person who took the acknowledgment was permitted to state, from his uniform practice in taking acknowledgments, he could not have taken it, in the case under consideration, had no seal been attached to the instrument.

Unless the inadequacy of consideration be so gross as to strike every person with a presumption of fraud, it is not evidence of unfairness.

OPINION OF THE COURT.

THIS is an action of disseisin, given and regulated by the statute of Indiana, and is brought to recover a tract of land adjoining to the town of Terrehaute. The claim originated under the act of Congress of the 5th of March, 1816, which granted bounties in land to certain Canadian volunteers. A military warrant which was issued to Follett, the ancestor of the plaintiffs, was laid upon the land in controversy, on which a patent was issued to him the 26th of October, 1816. Proof was made that the plaintiffs were the heirs at law of the patentee. The possession of the defendant was admitted.

The defendant offered an instrument written on the back of the patent, which purports to be a confirmation of a previous deed, as well as a conveyance of the land patented, to ——— under whom the defendant claims.

To this paper the plaintiffs object, because it has no seal, which is essential to the validity of a conveyance. On the part of the defendant, it is insisted, that a seal was attached

to the instrument when it was executed, and that by some accident it has been removed. Several witnesses were examined on this point, after inspecting the parchment, in the presence of the jury.

One of the witnesses states, that, on a close examination, he finds some trace of a wafer seal on the parchment. That the place where he thinks this seal was attached, opposite the signature of the grantor, is different from any other place on the back of the patent, as it has the appearance of having had attached to it a wafer. Other witnesses, on examination, cannot see any evidence of a seal ever having been attached.

Ebenezer Hoskiss, before whom Follett and wife made the acknowledgment of the deed, among other things in his deposition says, "that he has not the least possible doubt, from his manner of doing business, and from his actual knowledge of what was necessary to constitute a deed, he being an attorney of the supreme court of the state of New York at the time, and for three years previously, that at the time of acknowledging and proving said deed by Follett and wife, the seals were duly attached to their names on said deed, and that since that time they have been lost off by time and accident; and further, this deponent is confident and thinks it morally impossible that said deed should have been thus acknowledged and sworn to by said Follett and wife without the seals being duly attached to the same. That had the seals not been on when said deed was presented he would, beyond doubt, have affixed them to it."

A motion was made to overrule the above statement in the deposition as incompetent. But the court refused the motion, on the ground that the fact whether the instrument was sealed or not, was a matter for the jury. That the statements of the witness in regard to the seals were founded on his official action, from which his inferences

were drawn, and that the jury must judge from the whole relation. The witness gives his reason for saying, with great confidence, why the instrument was sealed. A witness to the execution of an instrument may not be able to recollect the signing and delivery of the deed, but from his uniform practice in such cases he is enabled to say, that he could not have signed the instrument as a witness until it was executed by the obligor. Hoskiss was not a subscribing witness, but in regard to the sealing of the instrument he is within the rule. From his uniform practice in such cases, he is confident the seals were on the parchment when he took the acknowledgment. This evidence is fit to go to the jury, that they may give it, and the circumstances with which it stands connected, that weight which it should have.

To rebut this evidence, the plaintiffs introduced a certified copy of said instrument from the record of deeds of the proper county, from which it does not appear, that when recorded, which was the same year of its date, there were seals attached to it.

There seems to be no controversy as to the execution of the other instruments under which the defendant claims; nor that the defendant is invested with the fee, if the above deed be valid.

The principal point, as you will observe, gentlemen of the jury, turns on the fact, whether the instrument which purports upon its face to be a deed of conveyance, was a sealed instrument at the time it was executed. If it was not, the fee remains in the plaintiffs as the heirs of the patentee.

You will examine the parchment to see if you can perceive any traces of a seal. The patent, as you perceive, is of an oily substance, to which a wafer, though made wet and pressed, would not strongly adhere. And this would especially be the case, where the pressure was made only by the hand.

From the words used on the face of this instrument, it purports to be a deed; and where this is the case, the solemnities required by law, such as signing, sealing, delivery, &c., in the absence of proof of the omission, is presumed. 17 Mass. 488; 3 Ib. 399; 10 Mass. 105; 11 Mass. 227. To suppose that the party, in such instances, complies with the rules of law, is merely to suppose he acts reasonably. The fact of sealing will be presumed, where no mark or impression on the parchment or paper appears, if the attestation notice the solemnity to have been complied with. But, there is no such fact stated in the attestation of this instrument.

Wax or wafer is not essential, or a scrawl, to make a seal. An impression on the parchment or paper, with an intent to make a seal, is sufficient.

If the witness saw the obligor sign, coupled with the circumstance of a declaration incorporated in the instrument, stating it to be sealed by him, it was held sufficient to warrant the jury in presuming that the deed had been regularly sealed and delivered. 7 Taunton, 521; Matt. Presumptive Ev. 39.

The deed, it seems, was recorded the same year it bears date, and no seal appears upon the record. This is relied on by the plaintiffs as rebutting evidence. The jury will consider it as such, and give to it the weight that shall be proper.

If, upon the whole, you shall come to the conclusion that the instrument was not sealed, you will find for the plaintiffs. Such an instrument is essential to pass the legal title out of the ancestor of the plaintiffs.

The consideration paid was one hundred and forty dollars. This, it is insisted, is inadequate. But inadequacy of consideration does not invalidate a contract, unless it be so gross as to strike every one with a presumption of fraud.

Burnley et al v. The Town of Jeffersonville et al.

In this case there are no circumstances which authorise the inference of fraud.

Under the occupying claimant law of Indiana, the occupant, should your decision be against him, will be entitled to compensation for his improvements, and must account for the rents.

The jury found the defendant not guilty.

BURNLEY ET AL. v. THE TOWN OF JEFFERSONVILLE ET AL.

A demurrer to a bill, which contains allegations of fraud, and strong circumstances of equity, must be overruled.

In such a case, the defendants must answer to the fraud.

Mr. *Morrison* appeared for the complainants.

Mr. *Stevens*, for the defendant.

OPINION OF THE COURT.

THE bill alleges that Isaac Bowman, a citizen of Virginia, was seised of five hundred acres of land in Clark county, Indiana, on a part of which the town of Jeffersonville was laid off. That in March, 1802, by a letter of attorney under his seal, he appointed John Gwathmey, now deceased, to lay off the town on one hundred and fifty acres, part of the above tract. The town to be laid off as the attorney should deem proper, and he was authorised to vest all the right, title, and interest, which Bowman had in the one hundred and fifty acres, in certain discreet and proper persons as trustees of said town; and he was authorised to sell the lots in said town at whatever credit he might think proper. He was authorised to convey two acres for the

public square of the town, to the trustees, or any other persons he might think proper, but only for the use of the town; and he was generally authorised to do every thing necessary to carry into effect the above powers.

The bill alleges that Gwathmey laid off the town, on the terms stated on the plan exhibited; and that he conveyed the land on which the town was laid off to certain individuals, with power to sell the lots and lands in the town, which were to be sold, and to pay over the proceeds of such sales to Bowman, his heirs or assigns. And the bill charges, that the said trustees and their successors in office made sales of many of the lots, but they have rendered no account or paid over any moneys received. On the eastern side of the town an oblong piece of ground was laid off, which has not been sold and accounted for by the trustees. Also, lots numbered 193, 194, 195, and 196, containing fifteen or twenty acres, have not been sold and accounted for. That the said trustees, or their successors in office, in violation of the power under which they acted on the 17th of May, 1813, for the nominal consideration of two dollars, conveyed to Johnston, of the above lots, 193 and 195. That these lots were taken by the said Johnston with full notice that the person making the conveyance had no power to convey on the terms stated, and that the same was fraudulent.

The bill also states, that the trustees, in violation of their powers, conveyed to William Goodwin, without consideration, lot 194, and that said conveyance was fraudulent and void. That lot 196 has never been conveyed by the trustees conformably to their powers. That in the year 1819, on the application of the trustees, the plan of the town, under an act of the legislature of Indiana, was altered, without the assent of Bowman, his heirs or assigns. And the complainants insist, that the public grounds and streets designated in the first plan being abandoned, the same

reverted to Bowman and his heirs. That under the change a great number of new lots were laid off and sold, and the proceeds applied to the use of the town. That various persons set up claims to the lots above designated, all of whom had notice of the claims of Bowman, his heirs and assigns.

The bill states the death of Bowman, the devise by him of the land aforesaid, and the purchase by Burnley of the interest of the devisees. And the bill prays that the deeds for the lots named may be declared to be void, and that the defendants be decreed to convey the lots to Burnley, assignee, as aforesaid. That the mayor and council may be decreed to account for the purchase money of the strip of land on the eastern boundary of the town; and also that they account for all sales of lots under the old plan of the town, as well as the new, which have been sold without authority; and that they convey all lots, under the new plan of the town, which have not been sold.

The defendants have filed a general demurrer, which raises the question, whether there is any equity stated in the bill, which entitles the complainants to relief.

The allegations of the bill, by the demurrer, are admitted to be true. It is admitted that the four lots, from 193 to 196, inclusive, were fraudulently conveyed by the trustees, and without consideration; and that the grantees had notice of Bowman's claim. It is also admitted that many lots have been sold under the new plan of the town, as well as under the old, and that the proceeds have never been paid to Bowman in his lifetime, or to his devisees since his death; and also that there are lots unsold, which the claimants pray may be decreed to be conveyed to them. The death of Bowman, his devise to his children, and the purchase of Burnley, are also admitted. Now, under this aspect of the case, it is difficult to say that the bill is without equity. No circumstance—such as lapse of time,

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the statute of limitations, or any other ground of defence—can be taken into consideration on demurrer. In this view, then, it is not perceived on what ground the demurrer can be sustained. The allegations of fraud must be answered. The demurrer is, therefore, overruled, and the defendants are required to answer the bill.

MORGAN, BUCK & Co. v. TIPTON, ELDRIDGE & CUMMINGS.

If the indorsee give time to the maker of the note or the executor of a mortgage to receive the payment of it, the indorsers are discharged.

If there has been fraud on the part of the indorsers, they may be made liable on that ground.

A defendant in his answer cannot introduce new matter in the nature of a cross bill, and require the plaintiff, and others under whom he claims, to answer it.

Such is not the English practice, which we have adopted. Under the laws of Indiana, no notes except those given to banks are placed under the mercantile law.

On all other instruments, the maker must be prosecuted to insolvency, before he can have recourse to his indorser.

A mortgage given to secure the payment of an usurious note, the usury not being purged, is infected, and subject to the same rule as the note.

In Indiana, usury makes void the instrument.

If the holder of an usurious note, not known to be usurious by him when received, yet have a knowledge of the usury before the mortgage was taken, it makes void the mortgage.

Even without any notice, the mortgage having been given for an usurious debt cannot be enforced.

The defendant's answer is evidence, when responsive to the bill.

Messrs. *Fletcher* and *Butler* for complainants.

Messrs. *Smith* and *Wright* for defendants.

OPINION OF THE COURT.

The complainants represent in their bill that they are merchants in Philadelphia, and that Job Eldridge and Thomas J. Cummings, being indebted to them in a sum exceeding four thousand dollars, Eldridge assigned to them a

note given by Spear J. Tipton to Cummings, and by Cummings assigned to Eldridge, for three thousand three hundred dollars, dated the 17th of April, 1838, with ten per cent. interest, amounting at the time of the assignment to three thousand, seven hundred and sixty-two dollars, in payment to the complainants in part of their debt. That to secure the payment of said note, Tipton executed to Cummings a mortgage on one hundred and sixty acres of land, in Cass county, Indiana. And the complainants allege that Eldridge represented that the said sum was justly due by the said Tipton. That Cummings assigned to them the mortgage, and that a credit for the amount of the note was entered in the account of Eldridge & Cummings.

That in May term, 1840, Tipton confessed a judgment on the note, including interest, amounting to the sum of three thousand nine hundred seventy-five dollars and fifty cents. That on the complainants agreeing to give a stay on the judgment of two years, Tipton executed a mortgage on several tracts of land, to secure the payment of the judgment, with seven per cent. interest thereon. And the bill states that the time for payment has long since elapsed, but Tipton has not paid the judgment or any part of it. And the complainants pray that the said Tipton, and also his co-defendants Eldridge & Cummings, may answer under oath and show why the complainants should not have the relief for which they pray. They allege that Tipton pretends that the aforesaid note was given for an usurious consideration, and also the judgment and mortgages, all of which are, consequently, void; but the complainants aver that this pretence is untrue in point of fact: and they pray, if such a defence shall be set up and sustained, by the said Tipton, that then a decree shall be rendered against Eldridge & Cummings for the amount of the note and interest.

Among other interrogatories put by the complainants, the

defendant Tipton is called to answer, "whether said defendant did not make and execute to said defendant Cummings the said note and mortgage, or either, and which of them, as is in the bill in that behalf named; and, if yea, whether the same were not made and executed for a good and valuable consideration and as evidence of and security for a just and subsisting debt, or for what consideration and purpose were they made and executed."

Also, "whether Tipton and wife did not make, execute and acknowledge the said deed of mortgage to the complainants in their bill named, and upon the consideration and agreement therein named, or upon some other and what consideration and agreement."

And the bill prays that an account may be taken of the judgment, &c., and that unless payment shall be made in a reasonable time the mortgage may be foreclosed and the lands sold, &c., and that if the said Tipton shall set up a good and equitable defence, the said Eldridge & Cummings may be decreed to pay the judgment, &c.

Eldridge & Cummings demur to the bill, and the defendant Tipton, in his answer, admits the judgment, and the execution of the mortgage to secure the payment of it, as stated in the complainants' bill. And he further states, that on the 1st of May, 1836, being in great want of money he loaned from Cummings five hundred dollars for six months, for which he agreed to pay two hundred and fifty dollars interest. He accordingly executed his note for seven hundred and fifty dollars, payable in six months; and if payment should not be punctually made, ten per cent. interest, from the date of the note. When the note became due, being unable to pay it, the defendant loaned, in addition to the sum before borrowed, two hundred and fifty dollars; the former note being canceled, he executed another note to the said Cummings for eighteen hundred dollars, payable in six months, and if not paid punctually, ten per cent. interest

from the date. To obtain a further indulgence for a year, and on the cancelment of the note last given, the defendant executed another note for three thousand dollars, payable in twelve months, with ten per cent. interest, from the date of the note, if the payment should not be made punctually. When that note became due, not being able to pay it, the note was cancelled, and another note for three thousand three hundred dollars, payable in six months, was executed by the defendant, which, if not paid punctually, was to draw ten per cent. interest, from its date. To secure the payment of this last note the mortgage was executed first named in the complainants' bill, and which, after the mortgage was executed to secure the payment of the judgment to the complainants, was cancelled. And these facts are stated, as defendant alleges, in answer to the above interrogatory.

The defendant having answered the bill, makes his answer in the nature of a cross bill, and the complainants, with his co-defendants, Eldridge & Cummings, are made defendants; and he prays that they may be required to answer the matters and things specified in his answers and he propounds several interrogatories.

Eldridge & Cummings demur to the cross bill as set up in the answer; and the complainants answer the same.

The first question for consideration is, whether Eldridge & Cummings, are proper parties to the bill. The demurrer which they have filed raises this question.

They are not charged with fraud or combination to the injury of the complainants. On the contrary they allege that the charge of usury set up by Tipton is untrue. But they pray if they shall not obtain a decree against Tipton on the mortgage, that Eldridge & Cummings may be decreed to pay the judgment for which the mortgage was given. There is then nothing on the face of this bill, which might

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not be stated against the promisee and indorser of a note in every bill to foreclose a mortgage, given by the maker of the note.

Unless there be some peculiar ground of equity stated, the remedy against these persons is a legal one, and this remedy cannot be invoked by the complainants until they shall have prosecuted the maker of the note to insolvency. Under the statute of Indiana the note is not negotiable as mercantile paper. Two years indulgence was given on the judgment, on the defendants executing the mortgage in question. This would release from liability the prior indorser if the note be valid. Whether it would release Eldridge & Cummings from their original liability to the complainants, would depend upon the fact whether the note was assigned to them in payment of their account. If it were taken in payment, as from the statements in the bill would seem to be the fact, then the only recourse of the complainants would be on the indorsement of the note. And this recourse, as has been stated, is cut off by the indulgence given to the maker of the note. If the note were given for a fraudulent or usurious consideration, so as to render it void in the hands of the complainants, on that ground they would have recourse against the assignors. And this would be the case whether the liability was sought to be enforced at law or in equity. This ground is not only not taken in the bill, but it is expressly repudiated. There is then on the face of the bill no ground stated on which Eldridge & Cummings can be held liable, and their demurrer must, consequently, be sustained.

Had the bill alleged a fraudulent combination between Cummings and Eldridge to assign to the complainants, in payment of a debt due to them, a valid note, the bill might have been sustained against them and Tipton also. The facts, that the note was given to one of the partners, by him assigned to the other, and by that other assigned to the complainants, in payment of the partnership debt,

would require little, if any, additional proof, if the note be usurious, to establish a fraudulent intent.

The demurrer being sustained to the original bill, necessarily disposes of the demurrer by Eldridge & Cummings, to the cross bill attempted to be set up in the answer. Now if there is nothing on the face of the original bill these defendants can be required to answer, they are not proper parties to the bill, and cannot be called to respond to the interrogatories propounded in Tipton's answer.

But there is another ground equally fatal to this answer being treated as a cross bill. There is no such practice recognized in the courts of the United States. In Kentucky, such a practice prevails; but the chancery procedure of the courts of the United States is governed by the English practice, which requires a defendant to file a cross bill, if he desire the answer under oath, of his co-defendant or the complainant. This proceeding is regulated by the rules lately adopted by the Supreme Court. In this view then, the defendant having no right to set up in his answer the matter of a cross bill, objection may be made to the proceeding on motion or by a demurrer.

Two questions remain to be considered:

1. Can Tipton avail himself of the usury, under the circumstances of this case?
2. If he can, has the usury been proved?

By the second section of the act of 1833, it is provided that no rate of interest exceeding ten per cent. shall be received; and by the third section, that any one who shall violate the second section, shall be liable to be indicted and fined. These sections are embodied in the revision of 1838.

On the part of the complainants it is contended, that the confession of the judgment and execution of the mortgage by Tipton, precludes him from setting up the usury as a defence. There is no evidence that the complainants had any notice of the usury when Eldridge assigned to them

the note. But the proof is clear that they had notice, before the date of the judgment and mortgage. And it would seem that a knowledge of the fact of usury, as communicated to them by their counsel, induced them to indulge Tipton two years for the payment of the judgment. The confession of the judgment and the execution of the mortgage show a settled purpose by Tipton to pay the money. Acts of confirmation of a void contract could scarcely be stronger. Usury by the Indiana statute, as construed by the Supreme Court of that state, makes void the contract.

Where A made an usurious note to B, who transferred it to C, for a valuable consideration, without notice of the usury, and thereupon A gave a bond to C for the amount, the bond was held not to be affected with the usury, 1 Term 390. A *bona fide* purchaser, without notice, under a sale duly made, pursuant to the statute (of New York), by virtue of a power of attorney contained in a mortgage, is not affected by usury in the original debt for which the bond and mortgage were given. 10 John. Rep. 195.

An injunction will not be granted on the charge of usury, where the party seeks the discovery of the usury, and a return of the excess beyond the lawful interest, for the usury would have been a good defence at law, and no reason is given why the plaintiff did not make the defence at law. 1 John. ch. 49. Where the plaintiff was sued at law on notes alleged by him to be usurious, and he suffered judgment to be had against him, without making a defence or applying to this court on a bill of discovery in due season, he was held concluded and not entitled to relief. These are the authorities relied on to show that Tipton is, by his acts, precluded from setting up as a defence usury in the note on which judgment was entered. That by giving the mortgage, he not only waived the usury, but procured a forbearance of two years, which of itself constitutes a valuable consideration. Whether the forbearance is a valuable consideration, must depend upon the validity of the demand.

If that were void, by being usurious, it does not strengthen the cause of the complainants.

The complainants had no notice when the note was assigned to them, but this, it seems, does not relieve them from the effect of the usury. In *Lloyd v. Scott*, 4 Peters, 228, it was held "that usurious securities are not only void, as between the original parties, but the illegality of their inception affects them, even in the hands of third persons who are entire strangers to the transaction." "A stranger must take heed to his assurance at his peril, and cannot insist on his ignorance of the contract, in support of his claim to recover upon a security which originated in usury." The same doctrine is laid down in the case of *Lowe v. Waller*, Doug. 735, *Cowles v. Woodruff*, 8 Conn. 35, *Wales v. Webb*, 5 Conn. 154, *Baldwin v. Norton*, 2 Conn. 161. The note then in the hands of the complainants as assignees, if usurious, was void. It was not negotiable, though that fact is not noted as important in the cases cited. Do the judgment and mortgage purge the complainants' demand from the taint of usury?

In the case above cited from 10 Johnson, a sale under a mortgage was held good, and could not be affected by usury in the debt for which the mortgage was given. By the statute of New York such a sale was equivalent to a foreclosure by a decree in chancery. In the case under consideration there has been no sale, and this proceeding is on the mortgage and not on the judgment.

In *Lourme v. Saunders*, 1 Mar. 266, it was held that to a *scire facias* on a judgment, obtained on an usurious contract, the party will not be permitted to plead the usury in avoidance of the judgment. The same doctrine is in Cro. Eliz. 585, Ord. on Usury, 98. But in the same case the Kentucky court held that a note executed for the judgment, obtained on an usurious contract is void, and the usury may be pleaded, notwithstanding a judgment was rendered for the demand. In *Wickes v. Gogsoly*, 1 Car. & Payne, 396, the

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court held that a security given in lieu of a former security, which was tainted by usury, is void, unless in the second security a deduction is made of all sums paid usuriously under the former security. And, *Preston v. Jackson*, 2 Starkie, 237, the court decided that a party cannot recover on a new instrument which operates as a security for any usurious interest, although it be founded upon a new settlement of the account between the borrower and the lender, and the original securities have been cancelled. That was a case between the assignee and maker of the note. In *Roberts v. Goff*, 4 Barn. & Ald. 92, the court set aside a judgment founded on an usurious security, without compelling the defendant to repay the principal and interest.

There is no pretence that either on the confession of the judgment or the execution of the mortgage the usury was purged. And as before remarked, the complainants had notice of the usury before the date of the judgment and mortgage.

The present bill is brought to foreclose the mortgage, an instrument infected with usury. In *Lawless v. Blakeley*, 4 Mar. 488, and 5 Mar. 394, and 470, it was held the defendant may make his defence at law, or omit to do so and come into the Court of Chancery, either to enjoin the judgment, or to recover the money paid usuriously on it. But he cannot avail himself of both jurisdictions. If he make a defence at law, he must abide by it. Where usury has been sufficiently pleaded in an action at law, and on demurrer the plea adjudged bad and judgment rendered, the matter cannot be set up again in equity. The cause should be taken to the Court of Errors. *Lourme v. Saunders*, 1 Mar. 267. Where an unsuccessful defence is made before a justice of the peace, and an appeal taken to the Circuit Court which is dismissed for some fault in the justice or clerk, the party may still have relief in chancery, and this is a just exception to the rule that when the party

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makes a defence in one court he shall not apply to the other. *Cave v. Davis*, 5 Mar. 394; *Vance v. Hadrick*, 3 Litt. 108.

There is nothing then in the confession of the judgment, or in the execution of the mortgage, which precludes the defendant from setting up the usury in his defence. The remaining question is, whether the usury has been proved.

Cummings has been examined as a witness in the case before he was a party, but to every interrogatory which required him to speak of the usury he refused to answer, on the ground that he could not do so without subjecting himself to a criminal prosecution under the statute. A witness who fears no disclosures will never shelter himself under such a principle, where his character is involved. If, with truth, he could have denied the charge of usury he would, by his own oath, have denied it. The other witnesses show that Tipton was embarrassed, and that he was liable to be imposed on by money lenders. But these do not conduce to establish the usury. The defendants' counsel insist that it is established by Tipton's answer.

If the statements of this answer be true, in the creation of the debt demanded there was a shameless exorbitancy, as reckless of principle as of public opinion. By the advance of the sum of seven hundred and fifty dollars, disconnected with any other operation, in little more than two years, by renewing the loan, it was increased to the enormous sum of three thousand three hundred dollars. And the proof of this usury it is insisted is found in the answer of Tipton. So far as that answer is responsive to the bill, it is not only evidence, but evidence which can only be overcome by witnesses, or one witness and strong circumstances. The important inquiry then is, whether, in regard to the usury, the answer is responsive to the bill.

The first interrogatory above stated, and to which Tipton is especially called to answer, involves the consideration of

the note and mortgage given by him to Cummings, and “whether the same were not made and executed for a good and valuable consideration, and as evidence of and security for a just and subsisting debt, or for what consideration were they made and executed.” This inquiry is as broad as language could well make it. It would seem as if the draftsman of the bill was desirous of eliciting not only the facts in regard to the justice of the debt, but a full explanation of all the circumstances connected with it. For he asks, if the bond and mortgage were not executed as “evidence of and security for a just and subsisting debt, for what consideration and purpose were they executed.”

Now, in reference to this interrogatory, Tipton states that the above instruments were not given as evidence of and security for a just debt, and he goes on to explain the facts in support of this denial. The debt is shown to be unjust by the unconscionable and illegal exactions made by Cummings. And this is clearly within the scope of the interrogatory.

In the 1st of John. Rep. 582, it is said, where the complainant in his bill inquired into the consideration of the assignment of a note, but asked nothing as to usury; and the defendant in his answer alleged usury, the indorsement of the note was held *prima facie* evidence of a full and adequate consideration, and the answer of the defendant not to be evidence of the usury which ought to be proved.

If this be law, it does not apply to the case under consideration. For Tipton is not only called to answer as to the consideration of the note, but also as to the justice of such consideration. He answers it was unjust because it was usurious. Now, can it be pretended that the term usury is not responsive to the bill, because he was not specially called to answer whether or not the note was usurious. Might not Tipton, if such had been the fact, have answered that the note was unjust, because it was forged,

or was given without any consideration, or was fraudulently obtained. This is as much a question of common sense as of law.

In *Woodstock v. Barret*, 1 Cow. Rep. 711, 742, the complainant prayed a specific performance under certain articles of agreement, which had come to the defendant's hands, and called on him to answer as to the making of the articles, how they were disposed of, and when, where, and under what pretences, he got possession of them. He answered admitting the articles, but alleged that by consent of the parties, the articles were rescinded, and the seals torn off; the Court of Errors held that the answer being responsive to the bill and within the discovery sought, was legal and competent evidence. To the same effect is *Mason v. Roussatt*, 5 John. Ch. 504, 542-3.

In *McCaw et ux. v. Blewitt et ux.* 2 McCord's Ch. 90, 101, 102, the bill charged that certain advances had been made for the use of the defendant, who answered that he had given his note for all advancements, and though this was an affirmative fact in avoidance, yet it was held conclusive until disproved.

Where an affirmative fact is set up in avoidance of an express allegation in the bill, it must be proved. But where such fact is within the discovery sought for, it is evidence. Some decisions, it is admitted, have gone so far as to hold that the answer is not evidence where it asserts a right affirmatively, in opposition to the plaintiffs' demand. 1 Murf. 395. In the nature of things there can be no fixed rule on this point. Its decision must depend upon the words of the bill and of the answer. If the bill requires the defendant to answer whether he did not execute a certain note or bond, and the defendant admits the execution of it, and alleges that he paid it, the payment, not being within the interrogatory, must be proved. But if the bill allege that the note was given on a valuable consideration, and

for a just and subsisting debt, the answer must be as to the justness of the debt and the facts of the consideration. In *Reeks v. Postlethwaite*, Coop. Ch. Cases, 161, an explanation, essentially connected with the answer to the bill, is held to be evidence.

As the interrogatory in the case under consideration required the defendant to state what the consideration was, and whether the note and mortgage were not given to Cummings for a subsisting and just debt, no doubt is entertained that a full response by the defendant not only authorised but required him to state fully the nature of the consideration. This he has done, and there is no proof against the statement in the answer, consequently that statement, which establishes the usury, is evidence. The mortgage to the complainants, on which this bill is filed, was given to secure the payment of the judgment, which was founded on the note infected with usury, of which the complainants had full notice.

As has been already stated the judgment included the usurious interest. That interest amounted to the sum of three thousand three hundred dollars, deducting therefrom the sum of seven hundred and fifty dollars, which was the amount advanced by Cummings. The two years indulgence, and the confession of the judgment, and the execution of the mortgage, was manifestly a plan adopted to avoid the effect of the usury by the complainants. It was substantially the substitution of a new security for the usurious note, and as the security retains the usury it is as fatally infected with the vice as the original note. Under such circumstances Tipton would not be precluded from filing his bill against the complainants and the other parties to the note, to set aside the mortgage. And if he might have done this, it is clear that he may set up the usury on a bill to foreclose the mortgage.

Where the usurer, by an action at law, attempts to en-

force the obligation, which is usurious, the court will sustain the defence, and will not require the defendant to pay the amount loaned, with legal interest. But where the borrower seeks relief on the ground of usury, by filing his bill, the payment of the sum loaned, with legal interest, is made a condition of his relief: And here a question arises, whether in this case, the payment of the sum borrowed by Tipton, with ten per cent. interest, ought to be exacted of him. If this were a bill for relief by him, he would be required to state that he had offered to pay the principal and interest, and the court would require the money to be brought into court, before relief would be decreed. This is a salutary and just mode of proceeding; and I do not perceive why the same thing may not be done in the present case.

In the case above cited, of *Roberts v. Goff*, 4 Barn. & Ald. 91, where judgment had been entered on a warrant of attorney, and where there had been an agreement to give time, it was contended that the execution and judgment ought to be set aside, if the court had no doubt as to the usury, until the defendant had paid the money advanced, with legal interest, and the case of *Hindle v. O'Brien*, 1 Taunt. 403, was cited in support of the position. But the court overruled the case cited, and held that the instrument being void, the practice of the court had been otherwise. That being a case at law, in regard to practice, is different from the one now under consideration. The answer of the defendant sets up the usury, and admits the sum loaned, there is no difficulty, therefore, as to the relief to which he is entitled. And the question is, whether in this suit the defendant shall be required to pay the sums loaned, with interest, or the bill shall be dismissed, and the complainants or Cummings left to seek recourse against him by an action at law.

The mortgage being infected with usury is void, as also the note on which the judgment was entered; no action can be sustained on either instrument, but Tipton is bound to

pay the sum loaned, with interest, in equity ; and this equity, by the assignments, may be considered as vested in the complainants. To give them a recourse against Eldridge & Cummings, for the original consideration of the note assigned to them by Eldridge, it may not be necessary to prosecute this equity. Their recourse must be complete, from the fact that the note was void. But no doubt is entertained that the complainants, in equity, may recover from Tipton the sum he may be bound to pay to Cummings. Then why may not the defendant be required to make such payment to the complainants, in the present case ?

The specific prayer of the bill is, a foreclosure and sale of the mortgaged premises. But there is a general prayer, under which, any relief in the premises, to which the complainants may be entitled, can be given. By requiring Tipton, in this case, to pay the amount for which he is liable, a circuitry of action is avoided, and this is a cogent reason why the power should be exercised. In addition to this consideration, it keeps clear of the statute of limitations and other defences, which do not go to the merits of the case.

Upon the whole, it is ordered and decreed, that the defendant, Tipton, do pay to the complainants, or into the clerk's office, by the first day of the next term, the principal loaned by him from Cummings, with ten per cent. interest thereon. The interest to be calculated up to the time of giving each note, as stated in Tipton's answer, and to be added to the principal ; and interest on the entire sum, to the next note, &c. Let the calculation be made by a master.

STARR & SMITH v. MOORE ET AL.

An attachment laid upon property, does not change the ownership of such property.

The defendant may sell it subject to the lien of the attachment.

The same may be said of property levied on by execution.

A levy is said to be a satisfaction of the debt, if the property be of sufficient amount. And this is said to be the case, though the property should be wasted by the negligence of the officer.

The officer is the agent of both parties, and may be liable to either.

But, if the property be lost, without the neglect of the officer or the plaintiff, the loss must be sustained by the defendant, who has failed to pay the amount due.

A plea that property was attached and lost, is defective in not showing how the loss occurred.

Mr. Gregory, for plaintiff.

Messrs. Judah, Mace and Baird for defendant.

OPINION OF THE COURT.

THIS action is brought on a promissory note given for goods purchased in New York.

The defendants pleaded that under the law of New York, an attachment was issued, upon which goods sufficient to satisfy the debt in controversy were seized and detained, by means whereof the said goods were, and still are, wholly lost to the defendant. To this plea the plaintiffs demurred. It is objected that this plea is bad, because it does not set out the statute of New York, under which the attachment was issued. As the courts of the United States treat the statutes of the respective states as domestic and not as foreign laws, there is no necessity to plead or prove those laws, as laws of a foreign country.

If attaching property to the amount of the debt demanded, be an absolute discharge of the debt, this plea is sustainable.

In the case of *M'Intosh v. Chew*, 1 Black. 290, the court say, "we take the law to be, that the plaintiffs, by levying their execution on the lands of the defendant, have elected to take the specific property as a pledge for the satisfaction of their whole debt; and while it is held by them for that purpose, it is, for the time, presumed to be a satisfaction." In *Hoyt v. Hudson*, 12 John. 207, the court held, "when an officer under an execution, has once levied upon the property of the defendant, sufficient to satisfy the execution, he cannot make a second levy." In the case of *Clark v. Withers*, 2 Ld. Ray. 1072, it was ruled, that when a defendant's goods are seized on a *fieri facias*, the defendant is discharged. And in the case of *Ladd v. Blount*, 4 Mass. 403, it was expressly decided, that when goods sufficient to satisfy an execution are raised on a *fieri facias*, the debtor is discharged, even if the sheriff waste the goods or misapply the money."

In *Jenner v. Joliffe*, 9 John. 384, it was said, "if an officer have an authority to attach a man's goods, keep them in an unsafe place, or expose them to destruction, he acts contrary to the duty of his office." And in the same case, 6 John. 16, the court say, "if the loss of the timber happened while it was held under the attachment, and without the negligence of the officer, the defendant (at whose instance the attachment was issued) ought not to be responsible for it." And Mr. Justice Story, in his work on Bailment, says, section 128, "the officer, who has laid the attachment upon goods is considered as having the custody thereof as long as the attachment continues; and if he delivers them over to the bailee or to the debtor, and a loss ensues, he will be liable to the creditor, and the loss of the property is at his peril."

The laying of an attachment does not change the title to the property attached. The right of property remains in the defendant, subject to the lien of the attachment. And it is supposed that the effect is the same on the levy of an execu-

tion. In both cases, to change the right of property, there must be a sale under the process. But, in either case, if the marshal or sheriff shall be negligent, so that the property shall be destroyed, the officer is responsible. He is responsible to the plaintiff, and also to the defendant, the owner of the property. The officer is the agent of both parties, and may, therefore, be liable to either party.

The sheriff or marshal is bound, at least, to ordinary diligence for the preservation of the property in the custody of the law, and, consequently, subject to his control. He has a right to incur any reasonable expense in keeping the property. If it be live stock, he may pay the expense of keeping it, and tax it as a part of his costs. And it would seem to be reasonable, if the property be lost by the negligence of the officer, that the defendant should set up such loss in his defence, as in this case, to a new action for the same consideration. But if the loss be the result of accident, in no way chargeable to the officer or the plaintiff, the officer is not responsible, nor is it clear that the plaintiff sustains the loss.

In such a case, the officer would be considered the agent of the law, and by resorting to that agency for the obtaining of his debt, the plaintiff is not chargeable with any dereliction of duty, or act of injustice to the defendant. He is the delinquent party, in failing to discharge his obligation, and should a loss be incurred by an unforeseen casualty, which is not chargeable to the officer or the plaintiff, it would seem that the loss should be borne by the defendant. The plea is defective in not showing how the loss took place, and on this ground the demurrer is sustained.

On motion, leave given to amend the plea.

ROCKSELL ET AL. v. ALLEN.

A marshal's sale of land on execution, where the defendant had no interest in the land, will be set aside on motion.

In such sale there is no warranty by the defendant. The purchaser must understand what he buys.

But where he has been deceived or misinformed, the court will release him, by setting the sale aside. This is a proper mode of giving relief, if application be made before the sale shall be completed.

OPINION OF THE COURT.

MR. SMITH moved the court to set aside a sale of real estate made on execution in the above case, on the ground that the defendant had no title to the land or interest in it at the time of the sale. Before the judgment Allen, the defendant, conveyed the land to one Coates, taking a mortgage to secure the payment of the purchase money, which mortgage Allen had assigned, so that he had no interest in the land either equitable or legal.

Mr. Morrison, who opposed the motion, did not controvert the facts, but insisted that as the deed to Coates was on record, the purchaser was bound to know the state of the title, and having made the purchase with this knowledge he was entitled to no relief. That the maxim of *caveat emptor* applied with peculiar force to judicial sales. That the court would not, under the circumstances of that case, give relief to the purchaser on a motion, but would, if he were entitled to relief leave him to a suit in chancery.

It is clear that the defendant does not warrant the title of his land sold on execution. And if the sheriff or marshal, who sells, does not warrant it, he may bind himself, but not the defendant, in the execution. The Mont. Allegre, 9 Wheat. 616; *Loudon et al. v. Robertson et al.*; 5 Black. 276.

But the case before us is, whether a purchaser of land

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under execution, to which the defendant had no title, shall be compelled to complete his purchase. In *Muir v. Craig*, 3 Black. 293, the court gave relief on a bill filed against Craig, the defendant, in execution, whose land, as was supposed, had been sold on execution, but in which he had no interest, on the ground that the money received had been applied to the payment of the defendant's judgment. The amount paid was decreed to be refunded. It may be doubted whether this did not carry the principle too far. The purchaser must look to what he buys. But in the case before us, the question is, whether the purchaser shall pay his money where no interest was transferred to him under the judgment. He may have been negligent, but before the purchase is completed, he applies to be relieved, by setting aside the sale. That he had no notice in fact, whatever might be the inference of law, must be presumed, as no one would purchase that which he knew to be of no value. Whatever might be proper after the payment of the money and the execution of the sheriff's deed, we think when the application is made, at this stage of the proceedings, the sale should be set aside. And this summary mode by motion, being the least expensive, is the proper one.

TARDY ET AL. v. LEWIS MORGAN.

A court of chancery in any other state, than that in which land is situated, can make no decree which can affect the title to such land.

But having jurisdiction of the person of the owner of the land, they may decree a conveyance, and enforce the decree, by attachment or otherwise.

A conveyance executed under a decree, operates by virtue of the conveyance, and not by force of the decree.

In such a case, the chancery suit does not constitute a part of the title, and need not be presented as such. The proceeding in chancery may be looked at as showing the ground on which the conveyance was made. A knowledge of facts, which

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if traced and understood, will lead to a knowledge of title, is sufficient to charge a purchaser.

Fraud may be proved by circumstances.

Mr. Smith, for complainants.

Mr. Dunn, for defendant.

OPINION OF THE COURT.

THE bill states that the complainant, under a decree of the Chancery Court of Virginia, purchased the two half quarter sections in Shelby county, Indiana, which was conveyed to him by William Craddy, dated 28th May, 1842. That the deed was not recorded until the 5th September, 1843; before which time, Craddy had fraudulently sold the said land to Morgan, the defendant, who had notice of the previous purchase and deed; and that under this fraudulent purchase, he received a deed for the land from John Craddy and William Craddy, dated 21st November, 1842, which was recorded on the next day.

The answer admits the procurement of the title by the defendant, and denies any notice which can charge him.

The statute of Indiana gives effect to the deed first recorded, where a prior deed has not been recorded within twelve months. But, if the junior deed first recorded has been obtained fraudulently, the statute does not protect it.

The court in Virginia could exercise no jurisdiction over this land in Indiana. A decree of such court, could not by the mere force of its own power, reach the title or affect it. But having jurisdiction of the person, it had power to enforce its decree against him by attachment or otherwise. And it seems, that in obedience to its decree, the conveyance to the complainant by William Craddy was executed. This deed is the foundation of the complainants' title. And the proceeding of the court could not be referred to. It is insisted that the chancery proceedings constitute a part of the complainants' title; and that the extract of those pro-

ceedings, as certified and offered in evidence, are not admissible. But this objection is not sustainable. The deed was the act of the party, and is binding without a reference to the decree, if a consideration be named in it. And the reference to the chancery proceeding need be considered for no other purpose, except as showing a consideration.

The case must turn upon the question of notice. This the defendant does not sufficiently deny. The first letter to him from Houston, one of the complainants, dated 11th December, 1841, informed defendant that he and others had purchased the land, under a decree of the court, and inquired as to the quality of the land, and what amount of taxes were due upon it. Also, he inquired whether defendant, who had previously been Craddy's agent respecting the land, would act for the complainants.

The answer of the defendant, dated 27th December, 1841, gives an account of the land, amount of taxes paid, &c. He wished to know at what time the land was purchased, what kind of deed was given, and at what price the land could be purchased. Also, whether a deed of general warranty could be given.

A letter from William Craddy to defendant, dated June, 1842, complains of the proceedings of the court, of the sheriff in breaking open his doors, &c., and represented that he had been applied to for a deed which he would never give. That the proceedings were not binding, &c. The deed had been executed by Craddy in May preceding the date of this letter.

This correspondence shows a knowledge of facts by the defendant, which should, at least, have put him upon inquiry. Indeed, the last letter to him from Craddy was, of itself, sufficient for this purpose. It is true he denied having executed a deed for the land, but there was enough in the letter to excite a prudent man to cause the chancery proceeding in Virginia to be examined.

There are circumstances connected with the execution of the deed to the defendant, which create some doubt whether it was a *bona fide* transaction. The sum of twelve hundred dollars is named as the consideration in this deed. And the defendant alleges that this was paid by a conveyance of one hundred and sixty acres of land to the children of William Craddy.

In the cross bill filed by the defendant, he states that in 1834, William Craddy agreed to convey to John Craddy the tracts here in dispute, in consideration that he should assume a certain debt of seven hundred and eighty dollars, due by William Craddy to one Kyle, in which John was security. And complainant avers, that John did comply with the agreement, by paying the said sum of money, before the purchase by complainants. And it is averred that complainants knew of this contract.

In their answer the complainants deny every material allegation in the cross bill, and especially that they had any notice of the contract between William and John Craddy. And they deny that John had any interest in the land. The deed to defendant was executed by William Craddy and John Craddy, by William Craddy, his attorney; but no power of attorney was proved. Nor was there any proof that John Craddy paid the sum which, as security, it is alleged he agreed to pay. On the contrary the defendant states he paid the consideration by conveying other lands to the children of William Craddy.

In the first place we think the defendant had notice to charge him, and this, connected with the circumstances referred to, go to establish the fact that this purchase was not *bona fide*, and that the complainant is entitled to the relief he prays for. Decree, &c.

Doe ex. dem. Strong v. Smith.

DOE EX. DEM. STRONG v. SMITH.

When a deed is executed out of Indiana, for land within it, and which is acknowledged before a justice of the peace, under the Indiana statute, the clerk of the county should certify as to the authority of the justice and not the secretary of state.

A deed not acknowledged, in Indiana, is valid between the parties, and when proved may be received in evidence. But such deed until properly acknowledged, though recorded, is not notice.

A deed valid between the parties, executed before an attachment is laid upon the land, and the deed being properly acknowledged and recorded, before the deed under the attachment, which was not recorded within twelve months, conveys a paramount title.

Mr. *Smith* for plaintiff.

Messrs. *Wick* and *Barbour* for defendant.

OPINION OF THE COURT.

THIS case is submitted to the court on a statement of facts. Both parties claim under Andrews. The lessor of the plaintiff's deed was executed in the state of Connecticut, 11th of January, 1840. The same day it was acknowledged before a justice of the peace, and certified by the secretary of state. It was recorded the 4th Nov. 1840. On 17th November, 1843, the clerk of the county, under the seal of the court, certified that the justice who took the acknowledgment was a justice, and it was again recorded in Indiana, in the proper county, the 27th Nov. 1843.

The defendant claims under an attachment, by a deed from the sheriff, dated 13th of July, 1842, which was recorded the 24th of January, 1844. The land was attached after the date of plaintiff's deed, and sold 23d of January, 1840.

The lessor of the plaintiff's deed was properly acknowledged in Connecticut before a justice of the peace, but the certificate of the secretary of state was not the proper evi-

Doe ex. dem. Strong v. Smith.

dence, under the Indiana statute, as to the authority of the justice. On this ground, it is presumed, the deed was certified with the seal and certificate of the county clerk in 1843.

In *Doe on the Demise of Wayman v. Naylor*, 2 Black. 32, the court held, "an acknowledgment is necessary for the admission of a deed to record, but is not essential to its validity." "If the recorder records a deed which has not the statutory requisites to admit it to record, such deed is not entitled to the legal effects of a deed." Oliver's Practical Conveyance, 274. The recording of a deed for land defective in a statute requisite, is not constructive notice of its existence to third persons. *Carter v. Champion et al.*, 8 Conn. Rep. 294. A deed not acknowledged, or acknowledged defectively, if recorded in Indiana, would not be notice, but it is good between the parties, and, when proved, is admissible in evidence.

The attachment was not laid upon this land until after it was conveyed to the lessor of the plaintiff. That conveyance was good between the parties, but, by reason of a defect in the certificate as to the justice, though recorded, it was not technically notice. This error being corrected the deed was again recorded, about two months before the defendant's deed from the sheriff was placed upon record. As the deed of the defendant was not recorded within twelve months from the time of its execution, and not until after the lessor of the plaintiff's deed was recorded, effect is given to the latter, unless it shall be shown to have been fraudulent. There is no pretence of this in regard to the plaintiff's deed. Upon the whole, we think the title of the lessor of the plaintiff is paramount to that of the defendant, and, consequently, the judgment must be entered in his favor.

BUCKINGHAM v. BURGESS ET AL.

A defendant may set up in his defence under the general issue, that the plaintiff is one of a partnership, and that the firm is indebted to him in a larger sum than that which the plaintiff demands, it being a part of the same transaction.

An individual who holds himself out to the world as a partner, should be held responsible as such, though in fact he be not a partner.

Smith, for plaintiff.

Newman, for defendant.

OPINION OF THE COURT.

THIS action is brought to recover an amount alleged to be due, for labor in cutting and packing pork.

The defendant pleaded the general issue, and, also, payment.

There is no dispute as to the performance of the labor, or the amount claimed for it. But the defence mainly rested on an alleged partnership between the plaintiff and the Mahards, who had a large pork house in Cincinnati, and a commission house at New Orleans, to which latter place the pork of the defendants was consigned and sold, but the proceeds were not paid over to them.

Many witnesses were examined in relation to the alleged partnership.

The court instructed the jury, that if they shall find that a partnership existed between the plaintiff and the Mahards, they should find for the defendants; for independent of any objection as to the name in which the action is brought, it was clearly proved that no part of the proceeds of the defendants' pork had been paid over to them, which greatly exceeded the amount of the plaintiff's demand.

And the court also instructed the jury, that if they should find from the evidence, the plaintiff represented to the de-

The United States v. Administrators of Lane.

defendants that a partnership existed between the Mahards and himself, with the view of inducing them to employ the plaintiff to kill and pack their pork, and forward it to the house in New Orleans for sale, that they should find for the defendants, whether a partnership existed or not. An individual by holding himself out to the world as a partner, and thereby obtains credit himself, or gives credit to the firm, will be held responsible as a partner. This principle is founded upon considerations of morality and sound policy.

The jury found for the plaintiff.

THE UNITED STATES v. ADMINISTRATORS OF LANE.

The government of the United States has power to make a contract, as incident to its sovereignty. It may compromise a suit, and receive real and other property in discharge of the debt in trust, and sell the same.

The solicitor of the treasury is charged with this duty.

Such a procedure does not come under any authority to purchase lands.

This cannot be exercised except under authority of law.

Mr. *Cushing*, district attorney, for plaintiffs.

Messrs. *Lane* and *Wright*, for defendant.

OPINION OF THE COURT.

SEVERAL years ago, I. T. Canby, being indebted to the government in a large amount of money as receiver of public moneys, agreed, in discharge of his indebtedness, to convey to the United States certain lands. The district attorney, T. A. Howard, for Indiana, was directed to sell those lands, by the solicitor of the treasury; they were accordingly sold for cash, payable in instalments. The obligation for nine hundred and ninety-eight dollars, on which the present action is brought, was given on the purchase

of a part of these lands. And the defendants set up in defence, that the obligation is without consideration, and void in law. That the United States had no power to purchase lands, except under an act of Congress, and that they cannot sell without the authority of law.

The third section of the fourth article of the constitution declares, "the Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory, or other property belonging to the United States." By the seventh section of the act of May 1, 1820, it is provided, "that no land shall be purchased on account of the United States, except under a law authorising such purchase." The sixth section of the same act declares, "that no contract shall be made by the secretary of state, or of the treasury, or of the department of war, or of the navy, except under a law authorising the same, or under an appropriation adequate to its fulfilment," &c.

The first section of the "act for the appointment of a solicitor of the treasury, passed May 20, 1830, provides, "that the solicitor shall have charge of all lands and other property which have been, or shall be, assigned, set off, or conveyed to the United States, in payment of debts; and of all trusts created for the use of the United States, in payment of debts due them; and to sell and dispose of lands assigned, or set off to the United States in payment of debts, or being vested in them by mortgage, or other security for the payment of debts; and in cases where real estate hath already become the property of the United States by conveyance," &c. the solicitor is to release, &c.

This provision, it is contended, refers to lands previously obtained under laws of the United States, and not to those which might, afterwards, be acquired. That the act gives no new power to the government, through the solicitor, to acquire lands. And it is urged, that unless under an express law of Congress, through any of the agencies of the

government, lands cannot be purchased. That the lands now referred to, were not taken, under the laws of the state, in payment of a debt, or where the party was insolvent.

There can be no doubt that the act regulating the duties of solicitor, had a reference to existing laws in some of the states, which authorise the debtor to set off his real estate, on execution; and in other cases where he surrenders all his property to the United States, on which he is released; but all the provisions are not limited to these cases. Some of them are general, and apply to cases of "trusts created for the benefit of the United States, in payment of debts due them." But, independently of this provision, we think there was power in the government to receive the lands in question.

In the case of the *United States v. Tingey*, 5 Peters, 1828, the court, in considering the powers of the government to make contracts, say, "upon full consideration of the subject, we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States, being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts, not prohibited by law, and appropriate to the just exercise of those powers."

As a party to a suit, no one doubts the power of the government, through its properly authorised agent, to direct the course of the suit as shall best advance the public interest. And if a compromise be necessary for that interest, it may be made. And that is what was done in the present case. The lands were taken, not as a purchase, but to secure the debt of the late receiver. And these lands were sold on a credit, in order that the sum due by the receiver might be paid. It was a case of trust, recommended by the public interest, and opposed to no law or public policy. The action is sustained. Judgment.

Buckingham v. Burgess et al.

BUCKINGHAM v. BURGESS ET AL.

A bond binding an individual, as security for the plaintiff, to pay the costs in a suit named, is good, without naming any individual to whom the payment shall be made; the obligation is to pay the costs to whomsoever may be entitled to them.

Should the defendant recover the costs, he could bring the suit in his own name against the security.

Depositions may be taken under the act of Congress after the expiration of a rule to take them.

The caption in the deposition naming the suit should be correct.

But where, from the facts, there can be no uncertainty as to the case, the deposition should be admitted.

Mr. Smith for plaintiff.

Mr. Newman for defendant.

OPINION OF THE COURT.

The plaintiff being a non resident, under the rule of the court to give security for the payment of costs, the following bond was executed: "I, Daniel Hawkins, of the county of Fayette and state of Indiana, do hereby bind myself as security for Mark Buckingham for the payment of all costs which may be adjudged or taxed against the said Mark in a suit now pending in the United States Circuit Court, for the District of Indiana, wherein the said Mark Buckingham is plaintiff and Richard Burgess et al. defendants," &c. A motion was made to dismiss the suit for the want of security, on the ground that the bond does not specify to whom Hawkins is bound. The bond is good. The obligor is bound to pay the costs adjudged against Buckingham, to those who shall be entitled to them. A mere indorsement on the writ, as security for costs, has always been held sufficient. Should Buckingham fail in the action, and the defendant recover costs, his name can be used to enforce the payment of the costs.

An objection, in the progress of the suit, was made against certain depositions, because at the last term a rule was granted to take depositions, and those objected to were taken after the expiration of the time.

The depositions were not taken under the rule, but under the act of Congress, which requires no notice, after the rule had expired.

Another objection was made that the title of the cause stated in the caption of one of the depositions is not the true one. The deposition states the case of *Buckingham v. Burgess*. On the docket the case is *Buckingham v. Buckingham and McConahan*.

It appears that the process was served only on Burgess. Afterwards, McConahan came in voluntarily, and made himself defendant. There is no cause on the docket in the names of Buckingham and Burgess except the one above stated. Objections overruled.

THOMAS v. PAGE & PAGE.

Where a promissory note is made, the consideration of which is to be defeated if certain bills of exchange shall not be paid in the hands of the assignee without notice, the non payment of the bills cannot be set up as a defence.

And this principle is not affected by the statute of Indiana, which provides that the maker of the note may set up any defence against the assignee which he could make against the payee.

The agreement between the original parties would be a fraud upon an innocent assignee.

Mr. *Cushing* for plaintiff.

Mr. *Stevens* for defendant.

OPINION OF THE COURT.

At a former term this cause was before the court on a demurrer. The action was brought on a note given by the de-

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defendants, dated 19th Dec. 1838, in which, "twelve months after date they promised to pay John Stevens two thousand three hundred sixteen dollars and thirty-three cents, for value received." Endorsed by the payee to the plaintiff.

The defendants pleaded that the above note was executed in part consideration for two bills of exchange, drawn by Stevens on Lewis Evans, of Madison, Indiana, and accepted by him. And that by an agreement signed by the said Stevens, the above note "was not to be considered as an obligation binding on them to pay, if the bills of Lewis Evans are not paid at maturity," &c. And they aver that Evans became insolvent and did not pay either of the bills of exchange, or any part of them.

To this plea the plaintiff replied, that the said writing as a defeasance was made by Stevens, at the time the above note was executed, &c., to enable the said Stevens to dispose of the said promissory note to some *bona fide* holder, without notice, and with the intention of having the said writing set up against the note, &c.

In their rejoinder the defendants deny the fraud, and aver that the transaction was *bona fide*, &c. On this issue was joined.

This note is made assignable by the statute, so that the assignee may bring the action in his own name, but the maker may set up in defence any matter which could be set up against the payee of the note. There was evidence conducing to show that the note sued on was created with a fraudulent intent. And the court instructed the jury, if they should find from the evidence that, at the time the note sued on was signed by the defendants, there was a fraudulent intent to enable the payee to assign the note for its value, to any one ignorant of the defeasance, they should find for the plaintiff. Or if they shall find that the plaintiff paid full value for the note without any knowledge of the consideration, and that this imposition was practised

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through the contrivance of the original parties to the note, that they should find for the plaintiff.

F That fraud is not to be presumed, but it may be proved by circumstances. And that the manner in which the obligation of the note was to be defeated was well calculated to impose upon an innocent assignee. The statute permits the defendants to make defence against the assignee, as against the original payee; but where persons mutually engage to defraud others, and if the note intended to be the instrument of the fraud comes into the hands of an innocent assignee, who pays value for it, the original fraud cannot be set up as a defence against the assignee. The jury found for the plaintiff the amount of the note and interest.

GWATHNEY v. M'LANE & DONAHUE.

An agreement of one partner to pay a note against his co-partner, by entering a credit on a note which he holds against the payee, and a charge is made on the books of the firm against the partner for whom the payment is made, and he delivers to his partner other paper as payment, it is a payment to the payee of the note, although a credit was not indorsed on the note to be credited, until after the lapse of some months.

Should the payee be sued, after the agreement, on the note, on which the credit was to be entered, he could set up the agreement in defence.

And so could the agreement be set up in the defence by the partner who owed the first note.

The assignment of this note after it became due, in violation of the agreement, would not prevent the partner from making this defence.

A note assigned, after it becomes due, leaves the equities open between the original parties.

Mr. Crawford appeared for the plaintiff.

Messrs. Quarles and Brown, for the defendants.

OPINION OF THE COURT.

This action is brought on two notes given by defendants to J. B. Danforth & Co., for one thousand and seventy-six

Gwathney v. M'Lane & Donahue.

dollars, and indorsed by the payees to the plaintiff. After one of the notes became due, Donahue, who owed the claim, in the fall of the year 1841, made an arrangement with the payees, by their agent, to pay both notes by procuring a credit to be given on a note held by William M'Lane on Danforth & Lewis, for three thousand dollars. The holder of this note agreed to enter the credit, and proper entries were made in the books of the defendant, in an account current with William M'Lane. The defendant, Donahue, passed to the other defendant, M'Lane, other paper in payment; but the actual credit was not indorsed on the note, until some time in February, though the arrangement for the credit was made in October preceding.

Danforth & Co. were formed by Danforth & Lewis. Afterwards that firm was dissolved, and the firm of Danforth & Hildebran was formed. This firm was dissolved, and Danforth had the control and management of its concerns. The agent who made the arrangement as to the payment above stated, was fully authorised to act in the premises as attorney in fact for J. B. Danforth & Co. Danforth, at the time, was at Philadelphia. On his return to Louisville, Kentucky, and before he was informed of the above arrangement, he assigned the notes of Donahue to the plaintiff, as cashier of the Bank of Kentucky, as collateral security—the notes, at the time of the assignment, being over due. And from these facts, the question arises whether the notes were paid.

There can be no doubt, as between the original parties to the notes now sued on, there was payment. The power of the agent of Danforth & Co. is not questioned. And, in this respect, it cannot be material to which of the firms the notes were due, for Danforth had the settlement of the concerns of both firms. But the evidence is, that the notes were due to the first firm. M'Lane agreed that a credit should be entered on a note held against Danforth & Lewis

for three thousand dollars. At this time M'Lane & Donahue were in partnership, and on the books of the firm, Donahue was charged with the amount. So, as regards these partners, the transaction was completed; and Donahue, by proving the agreement and entry, could have obliged his partner to enter the credit. He did enter it, after the lapse of some months, to take effect from the time of the transaction. Now could not this arrangement have been set up as payment by Donahue, had suit been brought against him by Danforth & Co.? Of this there can be no doubt. Had suit been brought against Danforth & Co. on the three thousand dollar note, they could have set up the arrangement, as so much paid on that note.

The only remaining question is, whether the assignment of the notes deprives the defendants from setting up this defence. As the notes were assigned to the plaintiff after they became due, the equities between the original parties remained open, although the credit on the three thousand dollar note was not indorsed until after this assignment. The plaintiff should have made inquiry as to any equities which might be alleged against the notes. Being over due they were dishonored, and he was bound to know any and every equitable defence which might be made against them. These instructions were given to the jury, and they found a verdict for the defendants. Judgment.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—JUNE TERM, 1844.

BARNES & ROBINSON v. RYDER & Co. ET AL.

The holder of a bill of exchange, after the demand of the acceptor and notice to the drawer, is not bound to active diligence.

An administrator is not bound to pay over money to a creditor of the deceased partner of the person on whose estate he administers.

Had such a payment been made, the administrator could not have set up such payment in a suit brought by the representatives of the deceased.

Messrs. *Hardin* and *Smith* for plaintiffs.

Messrs. *Davis*, *Strong* and *Martin* for defendants.

OPINION OF THE COURT.

THIS action was brought on a bill of exchange drawn by Ryder & Co. on Julius Varrin, for six thousand five hundred eleven dollars and forty cents, payable to Reel, Barnes & Co., or order, four months after date. The bill was dated 10th January, 1837. Varrin accepted the bill.

The defendants pleaded that Varrin had their funds in his hands to meet the bill when he accepted it, and also when it became due; that he was at all times during his life, liable to pay the bill, and that his executors since his decease, at the commencement of this suit were liable. That at his decease he left a large amount of assets, after pay-

ing all debts except this bill. That among other assets he left an unsettled co-partnership concern of Varrin & Reel, which partnership consisted of the said Varrin and one John W. Reel, who at the time of his death was a partner in the firm of Reel, Barnes & Co. That Barnes was duly appointed administrator of the estate of Reel, and as administrator settled the co-partnership of Varrin & Reel, paying the debts thereof; and that after paying the debts of that concern, and before the commencement of this suit, a large amount of money, to wit, the sum of \$30,000, remained in the hands of said Barnes, of which he made distribution, by paying over one half, to wit, the sum of \$15,000, to one Justus Varrin, executor of Julius Varrin, and retaining the other half as part of the estate of Reel. That the said Barnes, previous to paying over the said sum of \$15,000, made no provision to pay said bill of exchange."

A second plea, substantially the same as the above, and in which it is averred "that before the commencement of this action the executor of Varrin directed the said Barnes in writing, to apply any funds in his, the said Barnes's hands, belonging to the estate of Varrin, deceased, in payment of the said bill of exchange; and that the funds are still in the hands and at the disposal of the said Barnes," &c. To the above pleas the plaintiff demurred.

The money stated in the first plea came into the hands of Barnes as administrator of Reel, and could not have been appropriated in paying this bill, for which the estate of Julius Varrin, who had been the partner of Reel, was liable. Had the executor of Varrin sued Barnes as administrator of Reel for money in his hands, he could not have set up this bill due the partnership in his defence.

And in regard to the second plea, with the consent of the executor, Varrin, the money in the hands of Barnes might have been applied to the payment of the bill, but as the plea states it was not so applied. Now can the failure of

Barnes to make this application prejudice his co-partners. In no sense was it a payment, and it is not pleaded as such. Barnes was not bound to active diligence. On the whole we think the demurrer must be sustained to both pleas.

LOW v. UNDERHILL.

No point is better settled than that the holder, by giving time to the maker of a promissory note, for a valuable consideration, discharges the indorser.

The payment of a part of the judgment against the maker of the note, on which time is given, constitutes no consideration.

The defendant was bound to pay the judgment.

Such an agreement, to release the indorser, must be valid, and one on which an action may be maintained.

Mr. *Logan* for plaintiff.

Messrs. *Powell* and *Baker* for defendant.

OPINION OF THE COURT.

THIS is a motion for a new trial. The action was brought against the indorser of a promissory note. The defendant filed the general issue, and annexed a notice under the statute, that the plaintiff having obtained judgment on the note "after execution, and before the return day, the plaintiff, in consideration that defendant would pay one hundred dollars, agreed to extend the time until the ensuing fall." And the question is, whether the time thus given to the maker of the note, discharges the indorser.

No point is better settled than that an agreement by the holder of a note to give time to the maker, on a valuable consideration, will discharge the indorser. By such an agreement, the holder of the note deprives the indorser of

his right to pay the holder the amount of the note, and be subrogated to his rights against the maker. The agreement suspends the right of the holder, during the time given, so that he can take no legal steps to collect the note. And unless the agreement be valid to this extent, it does not release the indorser.

Was the above agreement founded on a valuable consideration? The payment of one hundred dollars on the judgment, it is insisted, constitutes no consideration, as the defendant was bound to pay the whole of the judgment. A promise to pay interest is no consideration, as the debtor was already bound to pay it. 5 Wend. 505. In *Babodie v. King*, 12 John. 426, the court held, that "payment of part of the debt by the debtor, is not a consideration which will support a promise to forbear to sue." To the same effect is the case of *Harrison v. Close*, 2 John. 448.

The payment of the one hundred dollars constituted no legal consideration, on which an action at law or in equity could be maintained; consequently the agreement was not binding, and did not release the indorser.

GILLESPIE v. REED ET AL.

In Illinois, all fiction in the action of ejectment is abolished.

The copy of a recorded deed may be received in evidence, to show that when recorded, it had a seal on it, which had been removed from the original.

Deeds recorded under a statute in Illinois, are made notice to creditors and subsequent purchasers, though not properly acknowledged.

But such deed, when used in evidence, must be proved as similar instruments of writing.

Mr. *Peter* for plaintiff.

Mr. *Reed* for defendant.

OPINION OF THE COURT.

THIS is an action of ejectment. All fiction in this action, in Illinois, is abolished by statute.

In support of the plaintiff's title, a deed was offered which was executed in New Hampshire, and the acknowledgment of which was taken in that state before a justice of the peace. The certificate of the secretary of state, and the state seal, were offered as proving that the person taking the acknowledgment was a justice of the peace. This was objected to. The statute of Illinois regulating the execution of deeds out of the state, for lands lying within it, at the time this deed was executed, requires the certificate of the clerk, and seal of the court; if the person taking the acknowledgment be a justice of the peace, that he is a justice.

The district judge held this authentication sufficient. The circuit judge said, if the clerk, who is to certify, be the clerk of the county, which is supposed to be the meaning of the act, he thought the authentication not sufficient. That where the statute pointed out a form of a deed executed out of the state for land within it, the statute must be pursued. But the deed was read in evidence.

The defendant offered a deed purporting to be under seal, but the seal not appearing on the face of the deed, a copy of the record was admitted to prove that originally it had been sealed.

An objection was made to the acknowledgment, because it did not state that the grantor making the acknowledgment, was known to the person taking it.

The act of July 21, 1817, provides, "that the recording of any deed, grant, &c., shall be deemed and taken to be notice to subsequent purchasers and creditors, from the date of such recording, whether the said writing shall have been acknowledged or proven in conformity to the laws of the

state or not; provided, that no such writing, acknowledged or proven in conformity to the laws of the state, to entitle the same to be recorded, shall be admitted as evidence in any court, unless execution thereof be proven in the manner required by the rule of evidence applicable to such writings." And it was declared, that "that act shall apply to writings heretofore executed." Previous laws authorised deeds to be recorded which had been acknowledged, &c., without a certificate that the officer knew the person making it. The deed was admitted on parol proof of its execution.

NELSON v. BARKER & STEWART.

By the common law amendments were permitted, if there was any thing to amend by.

Anciently all amendments were required to be made at the term when the error occurred.

But now they may be made, at any time before judgment, and, in some cases, afterwards.

A misnomer may be amended after plea in abatement.

The plea gives the matter, by which to amend. But under the act allowing amendments, the declaration may be amended.

Mr. Hall for plaintiff.

Mr. Peters for defendants.

OPINION OF THE COURT.

THIS was an action of assumpsit to which the defendants filed a plea of misnomer. And the plaintiff moved for leave to amend the writ and declaration. This was objected to on the ground that there was nothing to amend by. At common law the court could give leave to amend only

where there was something to amend by. And anciently amendments were required to be made at the term at which the error occurred; but now an amendment may be made at any time before judgment, and, in some cases, after judgment.

In the case of *Randolph v. Barret*, 16 Peters, 141, the court held where suit was brought against the defendant as administrator, on a plea in abatement being filed, alleging that he was executor and not administrator; that the circuit court had power to allow the writ and declaration to be amended. And they say, "In this case the defendant admitted by his plea that he was the person liable to the suit of the plaintiff; but averred that he was executor and not administrator." "And when the plea was filed it became part of the record, and furnished matter by which the pleadings might be amended." And the court remark, "express authority is given by the 32d sec. of the judiciary act of 1789, to the courts of the United States, to permit either of the parties, at any time, to amend any defect in the process or pleadings, upon such conditions as the court shall, in their discretion, and by their rules, prescribe." "This amendment is, therefore, not only authorised by the ordinary rules of amendment, but by the statute also."

The case of a misnomer is, in principle, similar to that above cited, as the plea in both cases gives the true name or designation. On the general ground from the above authority, the amendment may be permitted under the act of Congress. Leave to amend.

HOMAS v. M'CONNELL & VANSYCKEL.

Property received collaterally, and not in payment of a note, cannot be set up, in an action on the note, by way of set-off.

Unliquidated damages cannot be pleaded as a set-off.

Where a plea alleges that the payee of a note received another note and mortgage, to be applied to the note, it is to be construed that the proceeds of the note and mortgage are to be applied when received.

To make such a plea good, it is necessary to aver the receipt of proceeds, &c.

Messrs. *Hardin* and *Smith* for plaintiff.

Mr. *M'Dougal* for defendants.

OPINION OF THE COURT.

THIS suit is brought on a promissory note to Stittinius & January, for eleven hundred and fifty-four dollars and twenty-six cents, dated at St. Louis, 18th July, 1842, and payable the 26th of October, ensuing; which note, the plaintiff alleges, was assigned to him on the day of its date.

1. The defendants pleaded the general issue.

2. That when plaintiff bought said note of said Stittinius & January, he also received a note and mortgage upon personal property against Uriah Rapler, of the city of St. Louis, for over one thousand eight hundred and fifty dollars, the property of said defendants; that under and by virtue of said mortgage and note against Rapler, the said plaintiff has received all the property mentioned in said mortgage, and the said property so received was worth three thousand dollars, and the defendants offer to set off said sum of money, the value of said property as aforesaid, against the damages claimed.

3. The defendants also pleaded, "that after the making of said note to the said Stittinius & January, he, said defendant, delivered to them a large amount of land of the

Thomas v. McConnell & Vansyckel.

value of one thousand dollars, which, by agreement, was to be credited on said note; and defendant then also delivered and sold to said Stittinius & January, a note against one Rapler, of St. Louis, for over eighteen hundred and fifty dollars, which note was secured by a mortgage given by said Rapler, for and upon property of over the sum of three thousand dollars in value, which note and mortgage were agreed to be taken and applied upon said note sued on; all of which was known to the plaintiff at the time he took and accepted said note. And defendant avers, that said Stittinius & January did not credit said note as agreed as aforesaid, nor has the plaintiff given credit since the assignment; and, therefore, the said defendant now here offers to set off said sums of money upon and against the damages declared for, and sought to be recovered herein." The plaintiff demurred to the second and third pleas.

The second plea does not state that the property was received in payment. If received collaterally, it is not a proper subject of off-set. The demand set up as an off-set is unliquidated, and that is an insuperable objection to the plea.

The same objection applies to the third plea. It avers that the payees of the note agreed to apply the note and mortgage specified, upon the note sued on, "all of which was known to the plaintiff, at the time he took and accepted said note." But the plea does not show that one dollar has been received on the mortgage, to be applied within the language of the plea. So that if the note before us had not been assigned, the plea would not have been good against the payees. The mortgage and note were not received in payment. The allegation that the land was to be credited on the note, shows rather that the proceeds were to be credited. The plea does not show that the land was received in payment of the note.

The demurrer is sustained to both pleas.

SUYDAM, SAGE & Co. v. ALDRICH.

Any variance between the judgment described in the declaration, from that of the record, will exclude the record from being received as evidence.

Messrs. *Butterfield* and *Beaumont* for plaintiffs.

Messrs. *Logan* and *Little* for defendant.

OPINION OF THE COURT.

THIS action is brought against the defendant for an escape. The declaration stated the judgment, under the execution on which the escape was charged, as having been obtained by the plaintiffs against Elijah Doolittle for \$5590. The record of the judgment introduced as evidence showed, that the judgment was entered for \$5522 83 and costs, entered the 8th of December, 1838.

The record was objected to as evidence, on the ground that it varies from the judgment described in the declaration. This variance is fatal. A judgment to be used in evidence, as the foundation of the action, must be described with entire accuracy. It being a matter of record, there is no reason why the true statement of the amount should not be made. The record of the judgment cannot be read in evidence.

DOE EX. DEM. MOORE v. NELSON & ASHWORTH.

Under the act of 1831, in Illinois, a deed will convey land in that state, if executed according to the law of the state where it is made.

A statute may make good the defective acknowledgment of deeds.

It operates as a rule of evidence, as regards the execution of the instrument.

Doe ex dem. Moore v. Nelson & Ashworth.

A deposition before a mayor of a city, under the act of Congress is sufficiently certified, "as taken in pursuance of the act," though it be not stated that the witness was cautioned.

Mr. Butterfield for plaintiff.

Messrs. Logan and Baker for defendants.

OPINION OF THE COURT.

THIS is an ejectment to recover the possession of one hundred and sixty acres of land. Patent to Patrick Cain, dated 6th October, 1817; a deed from him to Patrick Benson, dated 17th May, 1819. This deed was executed in New York. The eleventh section of the act of Illinois, of the 24th of January, 1831, provides that a deed made out of the state, "the acknowledgment thereof having been made in the manner hereinafter directed, before any judge or justice of the peace of the proper county, in which such deed may have been made and executed, and certified under the seal of such county by the proper officer, shall be valid," &c.

The signature of one of the subscribing witnesses being proved, the other witness could not be found. Deed read in evidence, dated 22d January, 1840, from the widow and heirs of Benson to the plaintiff. A deposition under the act of Congress to prove this deed, taken before the mayor, &c., was objected to, because the mayor does not certify the witness was cautioned in the words of the act. The certificate states "that the witness was sworn in pursuance of the act of Congress, and carefully examined and sworn."

As under the above act, depositions are taken without notice, great strictness has been required. Perhaps in some instances this may have been carried too far. For, if on examining the deposition, surprise can be alleged by the other party, the court in the exercise of their discretion, will give time to re-take the deposition. In this case we think the objection must be overruled. The certificate does

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not state the witness was cautioned, but it states "that he was sworn in pursuance of the act." This is sufficient.

The defendant offered a deed from Patrick Cain, for the land in dispute, to Wordsworth, dated in 1818. This deed was acknowledged before a master in chancery. There is no evidence that the person who took the acknowledgment was a master in chancery, and the deed is objected to on that ground.

The act of 1822, provides, "that all deeds, mortgages, &c., which shall have been, or may be hereafter, perfected and executed according and in conformity to the laws of the state or territory in which they may be respectively made, for lands lying within this state, shall be and are hereby declared to be valid, to all intents and purposes, good and available in law." By the second section of the same act, "all deeds which have been made and acknowledged as above, are made valid." This section operates as a rule of evidence. The act of 1822, on this subject, was repealed by an act of 1827. The act of 1833 repeals all acts within its provisions, prescribing a different mode.

The deed offered by defendant was not recorded under the act of 1822. But the only question in relation to this deed is, whether the acknowledgment is a sufficient proof of its execution, and is within the above statute. There is no proof that the person who took the acknowledgment was a master. A master is appointed by the state court, and if he be authorised to take an acknowledgment of a deed in New York, this court cannot be presumed to know that he is authorised to act as master. On this ground, the deed offered by the defendant is overruled.

Verdict for the plaintiff.

CHRISTY ET AL. v. CUMMINS.

To rescind a contract for the sale of a chattel, the property must be returned, unless it be valueless to both parties.

A plea to an action on a note given for the consideration, which avers that the goods purchased are of no value to defendant, is not good.

Messrs. *Powell* and *Bryan* for plaintiffs.


Mr. *Southwick* for defendant.

OPINION OF THE COURT.

THIS is an action on a note. The defendant pleaded that the note was given for merchandise which was represented to be sound, but was unsound and damaged. To this plea the defendant demurred, on the ground that there was no offer to return the goods.

A vendee of a chattel cannot rescind the sale without offering to return it, unless it is worthless to both parties. *Perley v. Balch*, 23 Pick. 283. To render a rescision of a contract valid, the rescinding party must place the other party in *statu quo*. *Holbrook v. Burt*, 22 Pick. 546; *Conner v. Henderson*, 15 Mass. 319.

The plea avers, "that the goods were unsound and damaged, so as to be of no value to defendant." But there is no averment that they are of no value. For the purposes of the defendants they may have been, to them, of no value; but it does not appear that, if returned to the plaintiffs, they would have been of no value to them. The demurrer to the plea is sustained.



BEBEE & BROTHER v. MOORE.

A guaranty must have a consideration to support it.

If given at the time the contract, to which it relates, was entered into, the consideration will be found in the contract.

But if entered into subsequent to the contract, it must be founded on a valuable consideration.

A receipt of a warehouse man, that he holds one hundred and fifty barrels of flour, subject to the order of A. B. may be explained and impeached, if A. B. has made no advance, nor incurred any responsibility on account of it.

To charge a guarantor, on his principal's failure to deliver flour, &c. a demand of the article when due must be made, and a reasonable notice of failure given to the guarantor.

Mr. Johnson for plaintiffs.

Mr. Logan for defendant.

OPINION OF THE COURT.

THIS action is founded upon the following guaranty: "Quincy, January 23d, 1844. I hereby guarantee to Beebe & Brothers, of St. Louis, the delivery to them of eight hundred barrels of superfine flour, for account of D. G. Whitney, of this city, and to be manufactured at his mill, and to be sold by Beebe & Brothers, for his account; said delivery to be completed 1st of April next." Signed by defendant.

The third count in the declaration states, "in consideration that the plaintiffs would, at the special instance and request of the said defendant, advance and pay to one G. D. Whitney, a certain sum of money, to wit: the sum of five dollars upon each and every barrel of flour, &c.; eight hundred to be delivered, &c.

Under the practice authorised by the statute of Illinois, a motion is made to strike out this count, on the ground that there is no consideration averred to support the guaranty.

A guaranty must have a consideration to support it. If the contract of guaranty be entered into at the time of the contract, to which it relates, so as to constitute a part of the consideration of that contract, it is sufficient. But, if the guaranty be subsequent to the contract, there must be a distinct consideration to support it.

The understanding of the defendant was founded upon the agreement by the plaintiffs to pay to Whitney five dollars for every barrel of flour, &c. Now this is a valid contract. One party agrees to deliver a certain number of barrels of flour to the other, and that other to pay so much per barrel for the flour delivered. This is a binding contract; it is sufficiently alleged in the count, and the motion to strike out is overruled.

On the same day of the guaranty, it was proved a draft was drawn on plaintiffs for eight hundred and seventy-four dollars, by Whitney, which was subsequently paid. As the drawing of this draft and the guaranty bear date on the same day, the inference is a reasonable one, that the draft was drawn and accepted on the assurance the guaranty afforded, and this constitutes a consideration.

As an original ground of action against the defendant, unconnected with the guaranty, the following receipt was given in evidence: "Quincy, February 26th, 1844. Received of D. G. Whitney, in store, at his warehouse, one hundred and fifty barrels of superfine flour, which is to be held subject to the order of Beebe & Brothers, of St. Louis. Signed, Francis Moore." A deposition was offered to contradict this receipt, which was objected to, on which the judges were divided; the circuit judge being favorable to the admission of the evidence, and the district judge against it. On the same day of the date of the above receipt, a bill was drawn on the plaintiffs, by Whitney, for four hundred dollars, payable ten days after date, which the plaintiffs refused to pay.

The evidence to impeach the receipt would be inadmissible, if the plaintiffs had incurred any responsibility or done any act on the credit of it; but as there is no such evidence produced, or any such ground assumed by the counsel, the circuit judge held the receipt might be explained or impeached. This is the common principle which applies to receipts. The fact of refusal by the plaintiffs to pay the draft on the credit of this flour, shows the nature of the transaction. It does not, in fact appear, that the plaintiffs had any other interest in this flour, than to sell it as commission merchants—never having made any advance on it, or in any way received prejudice by it.†

The proof showed that the one hundred and fifty barrels had not been delivered, and the court instructed the jury that this receipt laid no foundation for a recovery, unless some advance on it had been made by plaintiffs, or some responsibility had been incurred by them.

And the court instructed the jury, that to charge the guarantor, a demand of the flour on the 1st of April, and a reasonable notice of a failure to deliver it to the guarantor, must be proved. That the place where the flour was to be delivered by Whitney, not being specially named in the contract, it would be for the jury to determine the place from the circumstances of the case. That the usual place of delivery, if no facts were proved to control it, would be the mill of Whitney, at Quincy, and that if the jury should find that was the place of delivery, the demand was sufficient. Verdict, &c.

The United States v. Chapman.

THE UNITED STATES v. CHAPMAN.

In an indictment for perjury under the bankrupt law, in not giving a true and full account of the property of the petitioner, the items on the schedule need not be stated in the indictment.

The allegation that the property was omitted, with intent to defraud A. B. and the other creditors, is sufficient.

Mr. Butterfield district attorney.

Messrs. *Logan* and *Field* for defendant.

OPINION OF THE COURT.

THIS is an indictment for perjury under the bankrupt law. The defendant being an applicant under the bankrupt law, presented a petition, which is set out in the indictment; and a schedule was annexed, which was sworn to by the petitioner. The indictment charges that the schedule did not exhibit a true account of all his property; that he owned a certain real and personal property, which is stated, and which he omitted to set down in his schedule, corruptly, fraudulently, &c.

The second count states the same charge, and that the petitioner had conveyed the property to his mother, in trust.

A motion is made to quash this indictment. 1. That the schedule was not stated at large in the indictment. This is unnecessary. No more of the items of property need be stated, than those charged to have been fraudulently and corruptly omitted. 2. That the allegation that the said property was withheld to defraud one of the creditors, naming him, and others, is insufficient, as all the creditors should be named.

The allegation is sufficient. All the creditors need not

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be named in the indictment. In this respect we think the indictment is good.

The motion to quash is overruled.

N. H. DAVIS & Co. v. M'CONNELL & VANSYCKEL.

Under certain circumstances, a suit may be prosecuted by the drawer of a bill of exchange, in the name of the payees, for the benefit of the drawer.

In such a case, payment of the bill by the drawer to the payees, is no bar.

The drawer having paid the bill to the payees, after the acceptors refused to pay it, had a right to sue the acceptors.

OPINION OF THE COURT.

THIS action is brought on a bill of exchange, drawn by F. Fielder on the defendants, dated at St. Louis, 2d November, 1841, and accepted by them, for one thousand dollars, payable in four months. The suit is brought for the use of the drawer.

The defendants pleaded, "that after the expiration of four months from the date of said bill of exchange and said acceptance, and after the same became due and payable, the same being unpaid by the acceptor aforesaid, they, the said plaintiffs, as payees of said bill of exchange, returned the same to the drawer thereof for payment: and the said drawer, then and there, after the said bill of exchange fell due and was unpaid, and before the commencement of this suit, on the 11th April, 1842, paid to the said plaintiffs the full amount of said bill, interest and costs due thereon, and then and there took up the same from the said plaintiffs: and that at the commencement of this suit the plaintiffs had no interest in said bill," &c.

To this plea the plaintiffs demurred.

This suit is brought in the names of the plaintiffs, the payees, for the use of S. R. Fielder, the drawer of the bill. The plea, therefore, is no bar to the action. By the acceptance the defendants acknowledged an indebtedness to the drawer to the amount of the bill, but the drawer being liable to the payees, took up the bill on the failure to pay by the acceptors, and now prosecutes this suit in the names of the plaintiffs, to recover the amount from the defendants, the acceptors.

The only doubt which would seem to arise on this demurrer is, whether the action can be maintained by the plaintiffs, under the circumstances of the case. The property in the bill is in Fielder, the drawer, he having paid to the holders the amount of it. In 2 Am. Com. Law, 324, it is said, "there is nothing in the law which forbids the holder of a negotiable note, after it has been indorsed, from using it in the name of another, with his consent, provided it is unattended with any circumstances of fraud and oppression. Nor is it unlawful for another person to institute such suit in his own name, with the privilege and consent of the party beneficially interested." And in *Gage v. Kendall*, 15 Wend. 640, it is said the holder of negotiable paper may bring an action upon it in the name of a person having no interest in it; and it is no defence that the suit be thus brought without the knowledge, assent or authority of the nominal plaintiff."

To sustain the present suit, it is not necessary to sanction the extent of this authority. For the plaintiffs are named in the bill as payees, and by bringing the suit for the use of the drawer, they show for whose benefit they sue, and no injury can result to the defendants from such a procedure. If they have any matter in bar or discharge, they may set it up, in this form of action, the same as if suit had been brought in the name of the drawer. The demurrer to the plea is sustained.

STURTEVANTS v. THE CITY OF ALTON.

A corporation having power to grade streets, &c., necessarily has power to make contracts respecting the same, in regard to the work to be done, and the compensation to be paid.

Under the power to establish post offices and post roads, Congress have adopted the mail regulations of the Union, and punish all depredations on the mail.

The same principle applies to the exercise of powers by a corporation.

Where a principal power is given, every incidental power necessary to give effect to the principal one, is included.

Mr. Wm. L. Lincoln for plaintiffs.

Messrs. Logan & Lincoln and *Mr. Bailey*, for defendants.

OPINION OF THE COURT.

THIS action is brought on the following bond: "Know all men by these presents, that the city of Alton acknowledges itself to be indebted unto G. & N. Sturtevant in the full and just sum of seven hundred and seventy-eight dollars and eighty-three cents; which sum, the said city of Alton hereby obligates itself to pay to the said G. & N. Sturtevant, their executors, administrators and assigns, with interest thereon at seven per centum per annum, on the 1st of March, anno domini, 1844, in specie or its equivalent, and for the payment of said sum of money, with the interest accruing, the faith and revenue of said city is hereby irrevocably pledged. In witness whereof, the mayor of said city, with the clerk of the common council of said city, of Alton, by order of said common council, have hereunto set their hands, and affixed the seal of said city of Alton, this 2d June, 1841." Signed by the mayor, &c.

Several special pleas have been filed by the city, some of which are objectionable in point of form, but as the object of the corporation is to test the validity of the contract, no other question will be considered.

It is objected that the corporation had no authority to enter into the contract.

This bond, it seems, was given in discharge of a bond which had been given by the town of Alton, under its former act of incorporation. That bond is stated to have been executed, "in part consideration of Sloo, Kemble and Perkins' entering into a bond conditioned for the grading and improving Peoria street, in the town of Alton, as designated in said condition, and for no other consideration." "It is alleged that that supposed writing obligatory was given without any lawful or competent authority." And it is contended, that if the first bond was void, the second, which was given in lieu of it, is also void. A deed of confirmation of a void instrument is not good. But, if there be a meritorious consideration, the second bond may be enforced.

The first act incorporating the town of Alton, of 20th February, 1833, provides, in the first section, "that the trustees of the town may grant, purchase and receive, and hold property, real and personal, within the said town and no other, (burial grounds excepted), and may lease, sell and dispose of the same for the benefit of the town, and shall have power to lease any of the reserved lands which have been appropriated by the original proprietors to the use of the town, and may do all other acts as natural persons; may have a common seal," &c.

The fifth section declares, "that the board of trustees shall have power, by ordinance, to levy and collect taxes upon all real estate within the town, not exceeding the one half of one per centum upon the assessed value; to establish night watches; light the city; improve the navigation of the river within the town; to regulate and license ferries; to erect and regulate public wharves, &c.; to open and keep in repair streets, avenues, lanes, &c.; and, from time to time, to pass such ordinances as to carry into effect the objects of this act."

The seventh section gives power to the corporation, "to regulate, grade, pave and improve the streets, avenues, &c., and to extend and widen the same."

The thirty-first section of the act of the 21st July, 1837, entitled "an act to incorporate the city of Alton," provides, "that the common council elected under such act, shall be deemed in law successors to the trustees to the town of Alton, to all intents and purposes; and all obligations and contracts entered into by the trustees of Alton, shall be carried into full effect by the common council of the said city of Alton."

In this latter act, full authority is given to the city corporation to carry out the contracts of the trustees under the former act, and this bond being within the power thus given, the only question is, whether it is founded on a valid consideration.

An instrument under seal purports a consideration, and this principle applies as strongly to a corporation, acting within its powers, as to a natural person. But if we look beyond the bond now before us, to the consideration on which it was given, it is sustainable.

The power of the trustees, under their act of incorporation, was ample to improve the streets and alleys of the town, and to enter into contracts for that purpose. For where a corporation is authorised to do that which can only be accomplished by a contract, it has power not only to make the contract, but to carry out in all its details, the principal power given.

Congress "have power to establish post offices and post roads," by the constitution, and in carrying out this principal power, the mail operations of the Union are regulated. Postmasters are appointed and their duties prescribed; mail contractors and carriers of the mail are regulated, and provision is made for the punishment of all depredations on the mail. This power is considered as an incident

to the principal power; and every one must see that without its exercise effect could not be given to the main power.

The same principle holds in relation to a corporation. It has power to pave streets, widen them, &c.; consequently it may make contracts for such improvements. It has power to levy a tax, consequently it has power to appoint an assessor and collector. The trustees of Alton had power to do these things. They in their contract stipulated the price at which certain improvements should be made, and the evidence of this contract was in writing, under the seal of the corporation. For aught that appears, the consideration on which the first bond was given by the trustees, had been duly performed at the time it was executed. If this were not so, there is no pretence that the work was not done before the bond now in question was executed.

From the recital of the first bond, in the record, it is seen that the first was executed, for grading and improving a street in the town within the power of the corporation. Upon the whole, we see nothing which can invalidate the bond now before us, and consequently the demurrer to the pleas is sustained. Judgment.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—JULY TERM, 1844.

DUNDAS ET AL. v. BOWLER ET AL.

An assignment of a note is a new contract, and is governed by the place where it is made.

The Supreme Court of Pennsylvania having decided that the assignment made by the late Bank of the United States to trustees for certain purposes, was valid, this court will so consider it.

The power of the bank to make the assignment depended on the construction of a statute of that state. The indorsement of a negotiable note in different states by different indorsers, will be governed, on the dishonor of the bill, by the local law where each indorsement was made.

The law of Ohio, which declares that an assignment by a debtor in failing circumstances, to a part of his creditors in preference to others, shall be for the benefit of all creditors, can have no effect on an assignment made in another state, of an instrument executed in Ohio. The act of 1824, in regard to assignments made by banks, does not apply, if the assignment was *bona fide*, so as to pass the interest out of the bank.

The act of 1842, which declared that the true construction of the above act was and is, to apply to all assignments, so as to compel the assignee to receive the notes of the bank in payment, by the assignee, as regards prior contracts, is unconstitutional and void.

On subsequent contracts it can have a constitutional operation.

The effect of this law on future contracts is, to restrain the negotiability of notes given to banks, by declaring that the equities, as between the original parties, shall remain open in the hands of the assignee.

Mr. *Worthington* for plaintiffs.

Messrs. *Wright* and *Fox* for defendants.

OPINION OF THE COURT.

THIS bill is filed to foreclose a mortgage executed by the defendants the 17th of July, 1839, on a lot in Cincinnati, to secure the payment of a certain sum to Shoenberger, who assigned it, and the accompanying notes for the same amount, to the Bank of the United States, on the first of September following. On the 1st of May, 1841, the bank assigned the mortgage and notes to the complainants, in trust, with other choses in action, to pay certain banks in the city and county of Philadelphia, for post notes of the Bank of the United States, which they held, amounting in the whole to the sum of five millions seventy-eight thousand four hundred forty-four dollars and ninety-four cents; a schedule of which notes is annexed to the assignment, and also the sums due to the respective banks. The choses in action assigned, amounted to the sum of seven millions seven hundred seventy-two thousand two hundred and fifty dollars. As the claims should be collected, payments *pro rata* were required to be made to the creditor banks, and after full payment, the trustees were to account for and pay over to the bank of the United States the surplus that should remain in their hands.

The defendants contend, that under the statutes of Ohio, they have a right to pay off the above mortgage and notes in the bills of the Bank of the United States, which are at a considerable discount. There are several other causes pending, which involve the same principle, and in one or more of which, the validity of the assignment to the complainants, is made a question. At the last term, this court held, that they could exercise jurisdiction in the case, and the points now urged in the defence may be considered under two heads.

1. Is the assignment to the complainants valid.

2. What effect can the statutes of Ohio have on the case.

And first, as to the validity of the assignment.

This point has been settled by the decision of the Supreme Court of Pennsylvania, in the case of *Dana v. The Bank of the United States*, 5 Watts & Sergt. 223. After considering the question at large, under the provisions of the charter and on general principles, the court say, "Hence, also, if the Bank of the United States had not had any express powers granted to it by the act of its incorporation, to dispose of and assign its property for the purpose of securing and making payment of its debts either in part or in whole, as the occasion might seem to require, in the judgment of the board of directors, it would have had such power by necessary implication, from the very nature of its business, unless it were expressly restrained by its act of incorporation, which is not pretended." They held that it belonged to the president and directors, and to them only, to make the assignment; and to determine on the propriety of its being done.

This assignment having been made in the state of Pennsylvania, is governed by the law of that state. It was made under a statute of that state, and the construction of that statute, in regard to the power of the president and directors, has been settled in the opinion above cited. This constitutes a rule of decision for the courts of the United States.

The law of the place where an assignment is made governs it, whether the instrument transferred be negotiable or not. A bill of exchange was drawn in Massachusetts on England, and indorsed in New York; and again it was indorsed by the first indorsee in Pennsylvania, and by the second in Maryland. The bill was dishonored, and a question was made for what amount of damages the respective indorsers were liable. In Massachusetts the damages on a

protested foreign bill were ten per cent., in New York twenty, and in Maryland fifteen; and it was held that each indorser was liable under the law of the place where the indorsement was made. Each indorsement was considered a new contract, governed by the *lex loci*; and that each indorser bound himself to pay, should the bill be dishonored, the damages given by that law. Story's Con. of L., Sec. 314.

This does in no respect conflict with the doctrine, that the law of the place where a contract is to be performed governs it. A note was made at Paris, in France, payable to the order of the payee, which was indorsed at Paris in blank. By the law of France, an indorsement to transfer the legal right in the note, the name of the party and the consideration must be stated; a blank indorsement is treated as a mere procuration. Suit was brought in England on this note, and it was held, that although the indorsement, if made in England, would have transferred the property in the note to the assignee, yet as such was not the effect of it in France, the indorsee could not maintain the action. Story's Con. of L., Sec. 315.

And so if an indorsement of a negotiable bill be made in a state, where a prosecution to insolvency of the maker is the condition on which the indorser is made liable, he can be made liable in no other mode. And if it shall appear that the indorsement was made to an unauthorised banking institution, in violation of law, the holder under such indorsement cannot maintain an action. The contract of assignment is as much governed by the *lex loci*, as the original instrument.

It is supposed that the statute of this state, of the 14th of March, 1838, which provides, that "all assignments of property in trust, which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors, to the exclusion of others, shall be

held to enure to the benefit of all the creditors," applies to the assignment under consideration. How this law can affect an assignment made in Pennsylvania, I cannot perceive. The idea that, as the original contract was entered into in Ohio, the assignments, though made in any other state, are governed by the laws of Ohio, is wholly unsustainable. This has already been shown. Now, is there anything in the nature of the above mortgage and negotiable notes, to make them an exception to the general rule? A deed for the conveyance of real estate, can only take effect in virtue of the law of the state where the land is situated. A mortgage comes within this rule, but the rule does not embrace an equitable transfer of such mortgage, and an indorsement of the negotiable notes, to which it is an incident. No law of a state can have an extra territorial operation. Contracts made within the state, unless they are to be executed beyond its limits, are regulated by the local law. There is no exception to this rule, except as regards the sale and conveyance of real estate. Under the law of Pennsylvania, a debtor may secure by mortgage, or otherwise, some creditors in preference to others; and such is the common law. There is no law in Ohio, that can reach or affect the contract of assignment by the bank to the complainants.

The mortgage and negotiable notes are Ohio contracts. They were executed within the state, and nothing is required to be done under them in a foreign jurisdiction. We may look, therefore, to the local law to see what effect, if any, it can have on the terms of the above contracts.

It is conceded that where a note is given under a law which declares that the equities shall remain open between the original parties in the hands of a *bona fide* assignee, no negotiation or change of place can cut off this right of the maker. It is the law of the contract, and may be set up wherever suit shall be brought. And this holds in all in-

stances, where the local law enters into the contract and becomes a part of it. A note is given and made payable in a state where eight per cent. is the legal rate of interest. This interest is recoverable in a state where more than six per cent. is declared to be usurious. And this, in my judgment, is the only practicable distinction between the remedy and the law of the contract. The former belongs to the forum, like the statute of limitations, the latter is inseparable from the contract, like the rate of interest.

The ninth section of the act of 1824, in relation to assignments made by banks, provides, "that when suit is brought by a bank, or by assignees for its benefit, the sheriff shall receive the notes of the bank in discharge of the judgment.

In *Pancost v. Ruffer et. al.*, 1 Ohio Rep. 381, the court held "that where the debt due a bank has been assigned in good faith, and the bank has no interest left in it, the assignee is not bound to receive the notes of the bank in discharge of it." The assignment by the Bank of the United States in this case, is not alleged or shown to be fraudulent. The assignment must be presumed to be *bona fide*, until the contrary be proved. But it is contended that the bank did not transfer the whole of its interest in the choses in action specified, as they exceed the amount of the debt secured by more than two millions of dollars, and the complainants are bound to account to the bank for the surplus. This is true, but the assignment is absolute until, from the proceeds, full payment shall be made to the creditor banks. Now whether there will be any surplus cannot be known before the collections are made. The interest of the bank is contingent, depending upon an event which may never happen. When the creditor banks shall be paid, the residue of the fund, if there shall be any residue, will belong to the bank. The whole of the fund, without any reservation, is conveyed by the bank for the payment of the debt, and until this object shall be accomplished the complainants in law

and equity have an exclusive interest in the mortgage claim.

The law of 1824 is not objectionable on the score of principle or policy. A bank should be compelled to receive its own paper in payment of debts, and also in discharge of judgments, whether obtained in its own name or in behalf of some other name for its benefit. And this is the extent to which the act goes. A *bona fide* assignment is not within the letter or policy of the act.

But it is insisted that the first section of the act of the 5th March 1842, which "declares that the true intent and meaning of the ninth section of the act of 1824 was, and is, to entitle every debtor of a bank or banker to pay such debt in the notes of the bank or banker, against such bank or banker, or the assignee of either, whether such bank or banker retains an interest in the same or has parted with all interest therein."

The legislature have an undoubted right to modify existing laws, or pass new ones, as in their judgment the public interest may require. And there are many cases in which they may give a retrospective effect to remedial laws. But they are expressly inhibited by the constitution of the United States, from impairing the obligation of contracts—and here the question directly arises whether the above act is not a violation of the constitution in this respect.

The settled construction of the contract in the hands of a *bona fide* assignee and holder, by the Supreme Court of the state is, that such holder is not bound to receive, in discharge of the demand, the notes of the bank. The statute would seem to be susceptible of no other construction. How then does the act of 1842 affect the contract. By it the holder is bound to receive the notes of the bank in payment. This then impairs the obligation of the contract. It provides that the contract shall be discharged by the payment of a different medium from that which the

constitution secures. Every evidence of debt gives the holder a right to demand in payment gold or silver, but the above act declares that such debt may be paid in bank notes. If this law had existed when the contract was entered into, there would be no objection to it. The effect of the act would then have been to restrain the negotiability of notes given to banks. The assignee under the law would have had no better right to demand payment in gold or silver than the bank, and this being the law it would have entered into the contract and constituted a part of it. It would be nothing more than leaving all equities open in a suit brought by the assignee, as they would have been in a suit brought by the bank. But this act instead of being a remedial one, as regards past transactions, strikes at the contract and essentially impairs it; the act is, therefore, as regards prior and *bona fide* assignments, unconstitutional and void.

A declaratory, like any other act, may be unconstitutional, as it impairs the obligation of prior contracts, and yet its action on future contracts may be unobjectionable. And this is the character of the act under consideration. From the time of its passage it modifies the ninth section of the act of 1824, but retrospectively, it can have no such effect.

An act which declared that all promissory notes which had been negotiated might be discharged by the makers, with the notes of the promisees, would so clearly impair the obligation of the contract to pay in gold or silver, that no one could doubt on the subject. And this, as regards prior contracts, is the effect intended to be given to the act of 1842.

The negotiability of choses in action, are subject to the regulation of the legislature, but they can no more affect a prior assignment, than they can impair or destroy any other prior contract. As between the original parties to the note, a law of off-set, though enacted subsequently to

the execution of the note, may apply to it. For in this view it relates to the remedy. But when the note is in the hands of a *bona fide* assignee, an off-set, as between the original parties to the note, cannot be applied to it without essentially impairing the legal effect of the contract of assignment.

A decree may be entered for the sum due, and if not paid in, the mortgaged premises may be sold conformably to the laws of the state.

THE UNITED STATES v. BURROUGHS.

A and B deposited certain bank notes with C and D, to be forwarded to the bank, with certain other notes on the same bank, owned by C and D.; and the notes having been all stolen from the mail, may be laid in the indictment as the property of C and D.

A slight and unsubstantial variance between the indictment and the proof, in regard to the direction of a letter which is not produced, and which the witness states, after the lapse of two years, with doubt, ought not to exclude the evidence.

And this is especially the case if, under some counts in the indictment, the objection of variance does not apply.

A carrier of the mail, for an offence under the law punishable generally, may be convicted, though not as carrier.

And being charged as carrier in the indictment, there being no such offence described, the word carrier will be considered as descriptive of his person and as surplusage.

One or more good counts in an indictment will sustain a general verdict of guilty, though there be one or more bad counts in it.

Mr. *Anthony*, the district attorney of the United States, appeared for the plaintiff.

Messrs. *Corry* and *Pugh* for the defendant.

OPINION OF THE COURT.

The jury having returned a verdict of guilty, on the seven counts contained in the indictment, a motion is now made for a new trial, and also in arrest of judgment.

On two grounds, the defendant's counsel insist that a new trial should be granted.

1. "Because the bank notes alleged to have been stolen, are stated, in all the counts of the indictment, to be the property of Semple and Barker, whereas the proof showed that they were the property of those persons and two other individuals."

2. "Because the proof was that the letter, which contained the notes, is averred in the indictment to have been directed to M. Garraty, Esquire, cashier, and the proof was, that it was directed to M. Garraty, Esquire."

It was proved that there were enclosed in the letter, bank notes on the Lancaster (Ohio) bank, amounting to two hundred and six dollars; one hundred and ten dollars of which belonged to Semple and Barker, and the residue to James L. Cooper and C. H. Kay. That these latter individuals deposited their notes with Semple and Barker, to be forwarded to the bank to procure exchanges. All the notes were enclosed in the same letter, by Semple and Barker, which was signed by them.

This is not a question between bailor and bailee; but the only inquiry is, whether there was such a property of all the notes in Semple and Barker, as sustains the allegation in the indictment. On this point there can be no doubt. They had possession of the notes for a special purpose, and were responsible for an improper use of them. The argument that they had parted with the possession of the notes, by enclosing them in a letter, by mail, requires no answer. A mere carrier may be described as the owner of the goods, 1 Hale, 512. Goods stolen from a washerwoman, may be described as hers, because she is answerable for them, 1 Leach, 357. If a coach be standing in the yard of a coach maker to be repaired, and a plate of glass and hammer cloth be stolen from it, the property may be well laid in the owner of the premises, 1 Leach, 356.

“Where a parcel is stolen from the boot of a stage, the property may be laid in the driver, though he may be no proprietor of the goods or the coach; and though as against his employers he has a bare charge, but as against the rest of the world, he has a legal possession.” *Ib.*

The second ground, as regards the direction of the letter, affords no sufficient reason for setting aside the verdict.

Barker, who directed the letter, says that his impression is, that it was directed to M. Garraty, Esquire, Lancaster, Ohio, but he does not speak positively on the subject. He made no entry of the superscription, and as two years have elapsed, it is hardly to be expected that he should be able to state the fact positively.

In Roscoe's Ev. 199, “in an indictment upon 7 G. III. c. 50, the letter was described as one to be delivered to persons using, in trade, the name and firm of Messrs. B. N. & H.,” the word, Messrs., being frequently added to their address, in the direction of letters and other papers received on business, though they themselves, in drawing bills, never used the word. This was held to be no variance.”

If the letter had been presented, and the direction of it varied from the allegation in the indictment, it could not have been received in evidence. For, although the direction of the letter need not to have been stated in the indictment, yet having been stated, the proof must correspond with the allegation. But in this case the letter was not produced; the statement of the witness not being positive as to the variance, and the jury having found the defendant guilty generally, the verdict, it seems to us, should not be set aside.

There is another view which is conclusive on this point. All the counts of the indictment, except three, are free from the objection of variance. The second count alleges that the letter was addressed to M. Garraty, Esquire, Lancaster, Ohio. The fifth count charges the defendant with embez-

zling a bag of letters, as carrier, which contained a bank note. And the sixth count contains the same charge, except a mail of letters is used instead of a bag of letters. The punishment on the two last counts, or either of them, is the same as on the three counts where the variance, if any, exists. So that, the finding of the defendant guilty on those counts does not, in the least, change the nature or amount of the punishment.

A motion for a new trial is addressed to the discretion of the court, and that discretion should never be exercised in favor of a defendant in a civil or criminal case, where substantial justice has been done, and where there is no principle of law which can operate favorably to the defendant. The letter, beyond dispute, was evidence under all the counts, except the third, fourth and seventh. The motion for a new trial is overruled.

The motion in arrest of judgment is mainly founded upon the first count in the indictment, which charges the defendant with stealing the mail of the United States.

In England, by the statute of 7 Geo. IV. ch. 64, a material change has been made in the law, so that many exceptions to an indictment, which were before fatal on a motion in arrest, now must be taken advantage of by demurrer or writ of error. This, however, is not the law in this country.

It is insisted that the carrier of the mail, if he take it fraudulently, is only guilty of a breach of trust; that such is the rule at common law, and that the act of Congress does not make it an offence.

In 1 Leach 1, it is expressly laid down, that at common law, persons employed in the post-office, have no special property in the letters committed to their charge, which may prevent their stealing from amounting to larceny. If a bag of wheat be delivered to a warehouse man for safe custody, and he take the wheat out of the bag and dispose

of it, it is larceny. Russ. & Ry. c. 6. 337. Where a clerk embezzled a bill of exchange, which he had received in the usual course of business to be transmitted by post, it was held to be larceny. 2 East. P. C., 565, case of Taylor.

The courts of the United States have no common law jurisdiction of offences, and the above citations are only made to show that the ground assumed as to the acts of the carrier, at common law, is not sustainable.

It is admitted, that unless the charge in the first count is sustained under the twenty-second section of the post-office act of 1825, the count is bad. The words of the section are, "And if any person shall steal the mail, or shall steal or take from or out of any mail, or from or out of any post-office, any letter or packet; or if any person shall take the mail, or any letter or packet therefrom, or from any post-office, whether with or without the consent of the person having custody thereof, and shall open, embezzle or destroy any such mail, letter or packet, the same containing any article of value, or any other article, paper or thing mentioned in the twenty-first section of this act; or if any person shall, by fraud or deception, obtain from any person having custody thereof, any mail, letter or packet containing any article of value, &c., such offender on conviction shall be imprisoned not less than two, nor exceeding ten years."

As the carrier of the mail, for any act of violence upon it, is punished with much greater severity than is provided in the above section, a presumption arises that the legislature did not consider the section as applying to a mail carrier. And this view is strengthened, by the provision that the offender shall be equally liable, "whether the mail, letter or packet, was obtained with or without the consent of the person having it in custody." Still, if the language of the section clearly embrace the offence charged, and it is punished nowhere else, the language of the section must

govern whatever may be supposed to have been within the mind of the legislature.

It is very clear the defendant cannot be punished as carrier of the mail; but the question is, whether the word "carrier" may not be considered as descriptive of the person, and not as aggravating the offence. Because an individual is a carrier of the mail, it does not follow that he is exempt from punishment for offences disconnected with his employment. Suppose the carrier of the mail should steal a horse, and in the indictment for it he should be described as the carrier of the mail, would that vitiate the indictment? Surely not. As carrier he is not punishable for stealing a horse, but as an individual he is punishable. The description, as carrier, would be regarded as surplusage. And this rule applies to the case under consideration.

The defendant is charged, as carrier, with stealing the mail. Now, there is no such offence known to the law. But stealing the mail is an offence, and, it is supposed, that the defendant, to such a charge, could not plead in justification or excuse that he was a carrier of the mail.

Suppose a carrier of the mail should steal a letter from a post-office, and should be indicted for the taking of the letter as carrier, could he not be convicted? His description as carrier would be considered as used to identify him, and not as constituting an ingredient by which the penalty is to be measured.

It is supposed that the count is defective, because the property of the mail is not laid to be in the United States, or in any one; nor is its value stated. This being a statutory offence, the value of the mail need not be stated, any more than the value of the letter. If a letter be stolen from a post-office, which contains an article of value, a higher punishment is inflicted on the offender, and consequently the article must be described and the value of it stated. But the taking of a letter, which contains nothing of value,

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no value need be averred; and so it is in regard to the mail.

I confess that I am inclined to think, if a carrier of the mail, having possession of it, shall steal it, he cannot escape for the reason that there is no provision in the statute to punish him as carrier. The act is punishable, and I see no reason why a carrier of the mail should escape. But it is unnecessary to overrule the motion in arrest, on this ground. The court do not decide the question. If the first count be bad, there being other counts in the indictment which are good, on a general verdict of guilty, the judgment cannot be arrested. In this, an indictment differs from a declaration. For one defective count in the latter, the judgment must be arrested; while in the former, one good count sustains the verdict. The motion in arrest of judgment was overruled; and the defendant was sentenced to ten years imprisonment in the penitentiary at hard labor.

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A failure to give security for costs, under the general rule of the court, no cause for setting aside a judgment.

Nor is the misapprehension of counsel a ground for doing so, under ordinary circumstances.

A judgment against the casual ejector, is different from an ordinary judgment, and may be set aside for good cause, after the expiration of the term at which it was entered.

In the notice offered to the declaration, the tenants should be named, and on them the notice should be served.

When the tenants are not named in the notice it is defective, and does not authorise a judgment against the casual ejector.

On the merits, connected with circumstances of great hardship, the court, in the exercise of their discretion, will set aside a judgment against the casual ejector at a subsequent term from that at which it was entered.

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Mr. Corry appeared for the plaintiff.

Messrs. Morris and Krepsey for the defendant.

OPINION OF THE COURT.

At the last term a judgment was obtained against the casual ejector, and a motion is now made to set the judgment aside, on the following grounds:

1. There was no security for costs given by the plaintiff.
2. The tenant in possession was instructed by his counsel that no steps would be taken in the case at the last term.
3. The notice was defective, in not being directed to the tenants in possession.

It is insisted that the lessor of the plaintiff being in default, for not having given security for costs, as required by the rule of court, that no default could be enforced by a judgment against the casual ejector. The want of security may be taken advantage of by motion at any time during the progress of the cause; but after judgment, by default or otherwise, this objection cannot be made.

If this were not different from an ordinary judgment, this motion could not now be heard. For after the expiration of the term the court cannot ordinarily set aside or modify a judgment. They may correct any clerical error in the entry of the judgment, but this is the extent to which their power may be exercised under the common law.

In *Waters' heirs v. Harrison and wife*, 4 Bibb. 87, it is said, that in ejectment the court need not be very strict in requiring cause to be shown to set aside a judgment against the casual ejector. 1 Caines' Rep. 503. The court will go further to protect the possession, when it can be done without injury to the plaintiff's claim, than it is willing in other cases to proceed.

Judgment against the casual ejector irregularly obtained,

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will, as a matter of course, be set aside, 5 Cow. 418; and as the situations of claimant and defendant, in ejectment, are materially different, the courts are liberal in their rules for setting aside judgments against the casual ejector, although regularly signed; and will grant them, even after execution executed upon affidavit of merits or other circumstances which at their discretion they may deem sufficient. *Doe d. Haughton v. Roe*, Burr. 1996; *Dabbs v. Paper*, Strange, 975; *Doe d. Grocers' Company v. Roe*, 5 Taunt. 205.

When judgment has been obtained against the casual ejector and writ of possession has been executed, on an affidavit of merits and of fraud or surprise, and the payment of costs, the court will set aside the writ and award restitution.

The misapprehension of the counsel as to the proceedings of the last term, that no step would be taken, can afford no ground on which to set aside the judgment at a subsequent term.

As to the defectiveness of the notice. The notice in this case is not directed to any of the tenants, but the person serving the declaration swears that he served a copy of the declaration on James Denham and other tenants in possession.

In *Craigh v. Clark*, 3 Marsh. Rep. 252, it is said that a notice in ejectment is in the nature of process, and cannot be aided by any statement of the person serving the declaration, or by the defendants' appearing and excepting, unless they enter into the common rule, and the court say that a defect cannot be aided by any statement of the person serving the declaration.

In *Beel v. Siberty*, 1 Wash. 154, the court say that the declaration and notice answer the place of process to coerce an appearance, and the notice should, with the certainty of an original writ, state to what court the tenants are to appear. Tillinghast's Adams, 229, the name of the

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tenant in possession must be prefixed to the notice. And again, the notice must contain the christian and surname of the tenant or tenants in possession. But it seems from *Doe d. Dawson v. Roe*, 5 B. Moore 73, that the notice will be sufficient, although the address to the tenant be altogether omitted, provided it be stated in the affidavit of service, that the tenant was duly served with a copy of the declaration before the assign day, and acknowledged such service.

In the present case there was no acknowledgment of the service by the tenants. The court could not know who were tenants, unless the affidavit of the person making the service be taken; and on that alone judgment was entered against the casual ejector. The consequence of such a judgment is to turn out of possession all the tenants on whom a notice was served. It seems to us that the tenants against whom the action is brought, should be named in the notice, and this should govern the person making the service. Any departure from this certain and safe rule would occasion great uncertainty and confusion. If the notice, as is manifest, is in the place of process to bring the party into court, the naming of the persons in possession would seem to be indispensable. How is the person who serves the notice to know who are in possession. He must go beyond the process to ascertain the fact. And if he may do this in so important a matter as this, why may he not do the same thing in the service of other process. When the tenants are named in the notice, the service is made on the responsibility of the plaintiff, as it should be, and, in case of a mistake, he is accountable for the costs. It seems to us that in this case the notice was essentially defective, and did not authorise the judgment.

The affidavit of Denham shows that he has been in possession forty years, has defeated several ejectments in the state court, on the title now set up, and that he claims

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under a patent from the United States. Stronger merits could not be shown, and on this ground, connected with the other circumstances of the case, we think the judgment against the casual ejector should be set aside. Judgment set aside, cause entered and consent, rule, &c.

M'LEAN, ASSIGNEE OF MAHARDS, v. LAFAYETTE BANK ET AL.

An assignee in bankruptcy has a right to file his bill in chancery against different mortgagees, to test the validity of their mortgages.

In this proceeding the assignee represents the general creditors of the bankrupts.

There is no absolute rule in regard to the multifariousness of a bill.

The decisions on this point are unsatisfactory and contradictory.

The rule is founded on convenience, and must be applied to the peculiar circumstances of each case.

The assignee having a right to discharge incumbrances on the bankrupt's estate, may file his bill against all incumbrancers to ascertain the validity, priority and amount of the incumbrances.

Such a proceeding is analogous to the foreclosure of a mortgage.

The demurrer admits all the material allegations of the bill.

Messrs. *Wright* and *M'Lean* appeared for the complainant.

Mr. *Corry* for the defendants.

OPINION OF THE COURT.

At the last July term this case was before the court, on a motion to dissolve the injunction which had been granted. On that motion the question of jurisdiction was generally considered and sustained. Leave was then given to amend the bill, which amendment has been filed, and two of the defendants, J. S. and M. Buckingham, demur to the amended bill, and assign as cause of demurrer, that it is multifarious, in joining distinct rights; and, also, in the misjoinder of parties defendants.

The complainant, as assignee of John and William Mahard, bankrupts, filed his bill in chancery, stating that John Mahard, jr., one of said bankrupts, being insolvent, and in contemplation of bankruptcy, gave mortgages to the Lafayette Bank of Cincinnati, and other persons, named as defendants, on various tracts of land and town lots, to secure to some of them the payment of large sums of money, and to indemnify others as indorsers for the said Mahards, all of which deeds of mortgage are averred to be in fraud of the bankrupt law. That the partnership assets of the Mahards are small, except the real estate mortgaged as aforesaid, all of which being applied in the payment of debts, will still leave among the creditors of the bankrupts, a large amount unsatisfied.

To the Buckinghams, mortgages were given on lots 404 and 460, in the city of Cincinnati, to indemnify and save them harmless on account of their indorsements for the said Mahards. On the same lots, previous mortgages had been executed to Andrew Johnson, to secure him against loss for his indorsements. In addition to these mortgages, a bill of sale was executed to the said Johnson, by the said John Mahard, jr., for a large amount of personal property, which is also alleged to be void under the bankrupt law.

The amended bill alleges, that the bankrupts held certain shares of stock in the Lafayette Bank, and in the Franklin Bank, to which the Lafayette Bank and John S. Buckingham, and the trustees of the Franklin Bank, set up some claim.

That John Mahard, jr., sold to Charles B. Dyer, that part of in-lot 404, described in the mortgage to the Franklin Bank, for the sum of ten thousand dollars. That the bank assented to the sale, and having received seven thousand dollars, released its mortgage. And that John Mahard, jr., received a house and lot in Lewistown, Hamilton county, from Dyer, in discharge of the balance due

on the purchase of the above lot. That this arrangement was assented to by the Buckinghams, and was made by the said John Mahard in contemplation of bankruptcy, and in fraud of the bankrupt law.

The amended bill further represents, that a mortgage was given by John Mahard, jr., on certain real property in Covington, in the state of Kentucky, to the Northern Bank of Kentucky, to secure certain payments to said bank due by the Mahards, which mortgage was in fraud of the bankrupt law.

It is also alleged that the mortgages executed to the banks, as aforesaid, were intended to secure loans of money, which were made at a greater rate of interest than six per cent. And the bill prays, that the conveyances aforesaid, for the reasons stated, may be set aside, and declared null and void, and the property mortgaged, sold for the general creditors of Mahard, and for such other and further relief, &c.

The above is a general but not a particular statement of the leading facts of the bill. It is sufficient to show the grounds on which the demurrer to the amended bill has been filed.

The demurrer admits, of course, that the mortgages set forth in the bill were given, as alleged, in fraud of the bankrupt law; and that they are consequently void. It also admits the usury alleged against the banks, and that the proceeding by the Buckinghams, in obtaining their judgment and execution, on which a certain amount of personal property was levied, was also void. And the demurrer rests upon the ground that there is an improper joinder of distinct matters, in which the defendants have no common interest.

Before this point is examined, it is important that we should understand the nature and object of the present bill. The assignee not only represents the bankrupts, but

their creditors; and it is his duty to contest the validity of all liens set up by a part of the creditors to the exclusion of others, where there is any reason to suppose that such liens have been created in violation of the bankrupt law. Under the eleventh section of the bankrupt act, he is authorised, by and under the direction of the proper court, in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, of the bankrupt.

The bill then may be considered in a double aspect. First, to set aside the liens which are fraudulent; and secondly, under the general prayer of relief, and the special one that the lands, &c., may be sold, and that such liens as shall be found valid, shall be discharged according to their priority. The bill alleges that there is little or no property of the partnership effects; and that the real and personal estate named in the bill, constitute the only property out of which a dividend can be paid to the general creditors. That the debts of the bankrupts far exceed their means of payment.

And first, on the supposition that the liens set out in the bill were executed in fraud of the bankrupt act, can the defendants be joined in a bill to set them aside?

It is true, as alleged in support of the demurrer, that interests wholly distinct and separate, it is said by decisions of courts and by elementary writers, cannot be united in the same bill. And the reason assigned is, that individuals ought not to be subjected to the expense and delay of investigating matters in which they have no common interest. That the pleading in chancery should rather conform to the simplicity of pleadings at law.

Lord Cottenham, in a late case, well observed, "that to lay down any rule applicable as to multifariousness, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible. The

cases upon the subject are extremely various; and the court in deciding them, seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule."

The decisions are contradictory, and each case, as it arises, must be governed by the peculiar circumstances connected with it. The matters of costs and hardship are the principal objections urged to such a proceeding; and the court must always determine from the case itself, whether these objections shall prevail. There is, in fact, no principle involved in this question, beyond the inconvenience and hardship stated.

Where the inhabitants of a parish had a right of common under a trust, a suit has been sustained by one in behalf of himself and all the other inhabitants. "In such cases, although there were or might be distinct interests in the different tenants or parishioners, yet there was a general right and privity between them as to the claim asserted in the bill." Story on Eq. Pl., sec. 121. This is conformable to the decision in the case of the *Mayor of York v. Pilkington*, 1 Ath. 282-284, that, says Lord Eldon, "which was a case of a claim to an exclusive fishery against many others who also claimed a right, in which Lord Hardwicke observed, where the plaintiffs stated themselves to have the exclusive right, it signified nothing what particular rights might be set up against them."

In *Dilly v. Doig*, 2 Ves. jun., 486, it was held that an author cannot file a joint bill against several booksellers, for selling the same spurious edition of the work, for there is no privity between them; and his right against each of them is not joint, but perfectly distinct." Story Pl. Ch. sec. 277.

Now, the above cases are irreconcilable. In the case of the fishery, there being a joint interest asserted in the bill, "it mattered not what particular rights might be set up

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against them." And in the case of the author, who asserted a sole interest, the suit could not be maintained, because there was no privity between the defendants, who had violated the copyright. It seems to me there is no sufficient reason in the distinction drawn between these two cases, that the one interest was local and the other general. The trespassers on the fishery may have been as numerous, and probably were more so, than the violators of the copyright.

"Upon a bill of peace, persons claiming by distinct titles, not in privity with each other, may be joined." Story Eq. Pl., sec. 278.

In the case of *Brinkerhoff v. Brown*, John. ch. 157, Chancellor Kent, after an elaborate view of the cases, said: "The principle to be deduced from those cases is, that a bill against several persons must relate to matters of the same nature, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct. And when we consider that the plaintiffs in the case now before me, are judgment creditors, having claims against the Genessee Company perfectly established, and not the subject of litigation in this suit; and that the general right claimed by the bill, is a due application of the capital of the company to the payment of their judgments; that the subject of the bill, and of the relief, and the only matter in litigation is, the fraud charged in the creation, management, and disposition of the capital; and in which charge all the defendants are implicated, though in different degrees and proportions; I think we may safely conclude, that this case falls within the reach of that principle, and that the demurrer cannot be sustained." The same doctrine is sustained in *Fellows v. Fellows*, 4 Cow. 682, and in *Boyd v. Hoyt*, 5 Page R. 65.

This doctrine may have been carried farther by Chancellor Kent, in the above case, as Mr. Justice Story sug-

gests, in his Equity Pleadings, page 234, than it has been carried in England. But whether such a case may have occurred in the English Chancery, is not so much the question, as whether, by the decision, any salutary rule has been violated. The rule as to multifariousness, as before observed, is one founded on convenience, and if, in carrying it out, Chancellor Kent has imposed no peculiar hardship on the Genessee Company, or subjected it to unnecessary expense, the rule is not of less authority than if it had been sanctioned in the English Chancery.

There was no privity among the complainants. They were judgment creditors, and they united in filing their bill against the company, alleging a fraudulent application of their capital. The case under consideration, it seems to me, is a stronger one for the exercise of jurisdiction, than the case before Chancellor Kent.

The complainant represents the interests of the creditors in this procedure. He alleges fraud in the several liens set up by the defendants. Now, although the frauds charged consist of various and distinct transactions, yet these frauds are of the same character, and for the violation of the same section of the bankrupt act. In every instance where the allegation of fraud is made, as against the respective liens asserted by the defendants, it consists in the bankrupt having created the liens in contemplation of bankruptcy, and to give an illegal preference to certain creditors. Now, these allegations are admitted by the demurrer, and in view of this fact, can the defendants, who have demurred, complain of hardship and oppression in being connected with others, who are charged with having committed similar frauds on the rights of the general creditors.

The liens of the Buckinghams cover the same property that is embraced by the liens of several of the other defendants. This is particularly the case as regards the mortgages on the two lots named, the lien of the judgment,

and also as to the claim set up to the personal property. Indeed, from the statements in the bill, it would seem that the scramble for the property of the bankrupts was so great by the defendants, and their interests have become so interwoven with each other in endeavoring, according to the averments of the bill, to evade the bankrupt act, that it is difficult to act on the allegations of fraud, without having spread out before the court a connected chain of the facts.

In his Equity Pleadings, section 533, Mr. Justice Story says: "The result of the principles to be extracted from the cases on this subject seems to be, that where there is a common liability and a common interest, a common liability in the defendants and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit." And in section 534, he says: "Indeed, where the interests of the plaintiffs are the same, although the defendants may not have a co-extensive common interest, but their interests may be derived under different instruments, if the general objects of the bill will be promoted by their being united in a single suit, the court will not hesitate to sustain the bill against all of them." *Campbell v. Mackay*, 1 Mylne and Craig, 603.

There is a common interest among all the general creditors, represented by the assignee, to set aside the liens named in the bill. The complainant's case, then, comes within the rule laid down in *Campbell v. Mackay*. How is it in regard to the defendants? Their interests arise under distinct instruments, but several of them claim liens on the same property; and, indeed, it may be said that they are all interested in a greater or less degree in the mortgaged estate of the bankrupts. The Buckingham's obtained a judgment by confession against the bankrupts, which, if valid, binds all the real estate of the bankrupts in Hamilton county; they are then interested to postpone all prior liens.

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And so it may be said of the mortgages under which they claim. It would be impossible for any court to act upon the liens of the Buckinghams, and especially to enforce them, without affecting, to some extent, the interests of other liens on the same property. There is, then, such an interest as makes it proper to include the Buckinghams in the suit, unless it shall subject them to unnecessary costs. And on this ground it is not perceived they have any cause to complain.

When the rule is established that all conveyances made by an individual, in contemplation of bankruptcy, and for the purpose of giving a preference to one or more creditors over the general creditors, it only remains to apply the rule to the different liens of the defendants. And it is not necessary to inquire into the intent of the bankrupt when he made the conveyance, but to show that he was in a state of insolvency, from which the intention is inferred, and the act makes the conveyance void.

Now, although the mortgages were executed at different times, yet all subsequent mortgagees are interested in the question, whether the mortgagor was in a state of insolvency when the first mortgage was executed; for if that fact shall be established, it makes fraudulent, equally with the first, all the subsequent mortgages. In this most material fact then, the defendants, who set up liens to the bankrupt's estate, have a common interest. The bill asserts the fact, and the Buckinghams, by their demurrer, admit it. How then can they insist that they are improperly united in this suit with the other defendants, and that a great hardship will be imposed upon them to enter into a controversy in which they have no interest. The turning point, in all the mortgages, is the one above stated. And in this the defendants have all a common interest. If this be so, the objection that the Buckinghams can have no interest in the allegation of illegal interest, in the amended bill, cannot

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sustain the demurrer. It is not necessary that the common interest of the defendants should extend to all the matters in the bill. If they have an interest in one or more leading facts in the bill, it is enough to sustain the jurisdiction, though in some other things there shall be no common interest. But the interests of the defendants cannot be said to be wholly disconnected with that which is to destroy or lessen any one of the special liens. By this, the general creditors' dividend is increased; and this is especially the case to those who have other mortgages on the same property.

In overruling the demurrer on this ground, I cannot see that any hardship or expense is imposed upon the Buckinghams. They are not necessarily subjected to any expense or even delay in investigating a matter in which they have no interest.

The question of jurisdiction on the other aspect of the case, is clear of all difficulty. The assignee has a right to pay the liens on the estate of the bankrupt under the order of the bankrupt court. He has a right to come into this court to set aside all fraudulent liens, and jurisdiction being acquired, the court, as a matter of course, will direct such liens as shall be held valid, to be discharged. On a broader ground the jurisdiction may be assumed. The assignee has a right to ask the aid of a court in chancery to assist him in the duty of discharging incumbrances. First, to ascertain their amount and their priority, and for this purpose, all who claim liens upon the bankrupt's estate, may be united as defendants, and called upon to answer.

Under the extensive powers given to the assignee by the bankrupt act, he might, perhaps, sell the equity of redemption in the mortgaged premises in question. But such a procedure, under the circumstances of this case, would be exceedingly improper, as it might sacrifice the interests of the creditors. Here is an estate amounting in value, pro-

bably, to forty thousand dollars, and which, with the exception of a very inconsiderable amount, constitutes the entire estate of the bankrupts. There are many creditors of large amounts who have no interest in the liens enumerated in the bill, and who claim a distributive share of the estate. With the view then to ascertain the validity, the priority, and the extent of the liens, the assignee has an unquestionable right to bring a suit, in chancery, against all the incumbrancers, to test the validity, priority and amount of their claims. And should the liens stated be found legal, or any part of them, this court will ascertain their priority and amount, and direct the money from the sale to be applied by the assignee accordingly.

This proceeding is in the nature of one to foreclose a mortgage. In such a case, all incumbrancers, whether prior to or subsequent to the mortgage on which the procedure is had, are proper parties. This enables the court to ascertain the priority and extent of the liens, and on a sale of the mortgaged premises, properly to apply the proceeds.

In such a proceeding, the object is not to ascertain pretended, but real incumbrances. The last mortgagee has a right to pay off all prior mortgages, and secure to himself the liens under them. But this is authorised only by a person who has a valid incumbrance; consequently, the court, in ascertaining all the incumbrances, must necessarily ascertain their validity.

The proceeding under consideration arises, necessarily, from the provisions of the bankrupt act. Effect could not be given to those provisions, in a case like the present, except through the interposition of a court of chancery. It is only in such a court that the priority of the liens can be ascertained. To determine this, the instruments must be before the court, so that they may be compared. The objection of usury, as averred in the amended bill, and which is the principal ground of demurrer to this proce-

dure, can have no weight. The court must inquire into the validity and the amount of the liens, to enable the assignee to discharge them; and, indeed, such discharge must be made under the decree of the court. The interest of the general creditors, and, also, the interest of the mortgagees, are all adjusted and finally settled by the decree. For this purpose, then, the jurisdiction of the court may not only be exercised, but it is not perceived how such a case can be properly settled in any other mode.

A sale on any mortgage does not affect the rights of other mortgagees, unless they are made parties. A mortgagee, whose mortgage is prior to that on which the sale is made, cannot be affected, as his right is paramount to the junior mortgage. Nor is the interest of a subsequent mortgagee affected; for, notwithstanding the sale, he may, not having been made a party, pay the purchase money and interest, and claim that the property shall be again sold in satisfaction of his mortgage, and of the sum paid by him to the first purchaser. The rights, therefore, of these mortgagees, can only be settled by bringing them before the court, as has been done in this case. And the allegation in the amended bill, as to the rate of interest charged by the banks, whether, if sustained, the effect shall be to avoid the instruments or the interest only, it was proper to make it a charge in the bill. In the decision of this point, the general creditors are not only interested, but also all the other mortgagees. For if the bank mortgages shall be set aside or reduced in amount, their mortgages, if valid, being for, in part, the same property, will secure the payment of a larger amount.

Whether the court can direct the sale of the land mortgaged in Kentucky, need not now be considered. The mortgagee is a party to the suit, and if, on no other ground, it would be proper to have that mortgage before the court, to see how it stands connected with other mortgages and

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liens, which the same mortgagee holds on other property in this state.

Upon the whole, I can entertain no doubt, that under this last head, the jurisdiction is sustainable.

The force of the objection as to misjoinder of parties is not perceived. The defendants in Kentucky have voluntarily answered, and that makes them parties to the suit. And if the interests of the defendants are properly brought before the court, as has been shown, there can be no objection to the joinder of those who claim such interests.

The demurrer is overruled.

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Under the eleventh section of the act of 1836, respecting patent rights, the patentee may assign any part of his patent so as to vest in the assignee the legal right.

By the same section every assignment of a patent right is required to be recorded in three months, from the time of its execution.

A failure to record such patent assignment does not forfeit the right of the assignee.

Should the same right be assigned, after the expiration of the three months, to a stranger, the assignee would hold it, whether he had or had not notice of the previous assignment.

The sale of the product of a patented machine is not an infringement of the patent.

But, if the person who sells is connected with the use of the machine, he is responsible for damages and may be enjoined.

And this may be done where the court have jurisdiction of the person, although the machine may be used beyond the jurisdiction of the court.

Mr. *Kenna* appeared for the plaintiff.

Mr. *Storer* for the defendant.

OPINION OF THE COURT.

In his bill the plaintiff represents that he holds by assignment the exclusive right, within the county of Hamilton,

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in this state, to make and sell "a new and useful improvement in the machine for cutting screws on the ends for the rails of bedsteads," patented to Lindley. And he charges that the defendant, Henry M'Alpin, in connection with one William Brown of Lawrenceburgh, county of Dearborn, and state of Indiana, in disregard of the complainant's right, constructed and has now in operation in the said town of Lawrenceburgh, one or more machines, in all the material parts thereof substantially like and upon the plan and arrangement and contrivance of the machines invented, improved, patented and put in operation by the said Lindley and described in said letters patent." And the bill prayed for an injunction to restrain the said M'Alpin from using said machine or selling the product thereof.

On the filing of the bill a motion is made for an injunction, until the final hearing, &c. And on the argument of this motion it is objected to the defendant's title, that two of the assignments which he claims were not recorded within the time limited by the act of Congress, and that they are, consequently, void.

By section 11, of the act of 1836, the patentee may assign any part of his patent, which assignment shall vest in the assignee the legal right to such part. And the same section provides, "that every such assignment shall be recorded in the patent office, within three months from the execution thereof."

In the case of *Dobson v. Campbell*, 1 Sum. 319, Mr. Justice Story held, that under the fourth section of the act of 1793 "the recording of the assignment was indispensable to convey the right." The words of that section are, "and the assignee having recorded the said assignment in the office of the secretary of state shall, thereafter, stand in the place of the original inventor both as to right and responsibility." After the recording, by the words of that act, the right vested in the assignee; of course it could not vest be-

fore the recording. But the act of 1836 affixes no penalty or condition, on a failure to have the assignment recorded in three months. That the assignment takes effect from its date is clear, and if it be not recorded in three months, the act imposes no forfeiture. In this aspect, the question must be considered as between the assignor and the assignee. And it is not perceived how any sound construction of the act can cause the right to revert to the assignor, if the assignee fail to record the assignment within three months. After the expiration of three months, no record having been made of the assignment, if another assignment of the same right shall be made, the last assignment would be valid. The doctrine of notice, as applied to land titles, could not operate in such a case. There is no exception in the statute, as to purchasers without notice. And this seems to me to be the proper effect to be given to the act.

It is insisted that a sale of the thing manufactured by the patented machine, is a violation of the patent. But this position is wholly unsustainable. The patent gives "the exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement." A sale of the product of the machine, is no violation of the exclusive right to use, construct or sell the machine itself. If, therefore, the defendant has done nothing more than purchase the bedsteads from Brown, who may manufacture them by an unjustifiable use of the patented machine, still the person who may make the purchase from him has a right to sell. The product cannot be reached, except in the hands of one who is in some manner connected with the use of the patented machine.

There are several patents of mills for the manufacture of flour. Now, to construct a mill patented, or to use one, would be an infringement of the patent. But to sell a barrel of flour manufactured at such mill, by one who had purchased it at the mill, could be no infringement of the patent.

And the same may be said of a patented stove, used for baking bread. The purchaser of the bread is guilty of no infringement. But the person who constructed the stove, or who uses it, may be enjoined, and is liable to damages. These cases show, that it is not the product, but the thing patented, which may not be constructed, sold or used. This doctrine is laid down in *Keplinger v. De Young*, 10 Wheat. 358. In that case watch chains were manufactured by the use of a patented machine, in violation of the right of the patentee; the defendant, by contract, purchased all the chains so manufactured, and the court held, that as the defendant was only a purchaser of the manufactured article, and had no connection in the use of the machine, that he had not infringed the right of the patentee.

But in the case under consideration, the bill charges that the defendant, in connection with Brown, constructed the machine patented; and that they use the same in making the bedsteads which the defendant is now selling in the city of Cincinnati. If this allegation of the bill be true, the defendant is so connected with the machine in its construction and use as to make him responsible to the plaintiff. The structure and use of the machine are charged as being done beyond the jurisdiction of the court, but having jurisdiction of the person of the defendant the court may restrain him from using the machine and selling the product. When the sale of the product is thus connected with the illegal use of the machine patented, the individual is responsible in damages, and the amount of his sales will, in a considerable degree, regulate the extent of his liability.

Whether, if the defendant acts as a mere agent of Brown, who constructed the patented machine and uses it in Indiana in making bedsteads, is responsible in damages for an infringement of the patent and may be enjoined, is a question which need not now be determined. Such a rule would, undoubtedly, be for the benefit of Brown, who, according to

Doe ex dem. Lockwood et al. v. Leicester Walker.

the bill, had openly and continually violated the patent in the construction and use of the machine. There are strong reasons why the interest of the principal should, by an action at law, and also by a bill in chancery, be reached through his agent. Injunction allowed, &c.

DOE EX DEM. LOCKWOOD ET AL. v. LEICESTER WALKER.

A stranger who obtains possession through a tenant, though by purchase of the land, cannot dispute the landlord's title.

Messrs. *Ewing* and *Hart* appeared for the lessors of the plaintiff, and Mr. *Squires* for the defendant.

OPINION OF THE COURT.

The plaintiff proved that Garret Smith leased the premises in controversy, from the ancestor of the lessors of the plaintiff; and that, while in possession, he sold them to Walker, the defendant. The lease to Smith having expired, the defendant claimed under his purchase.

The court instructed the jury, that as the entry was under Smith, the tenant of the lessors, the defendant, Walker, could not dispute the plaintiff's title, and that, consequently, they must find for the plaintiff. The verdict was accordingly so rendered.

BROOKS & MORRIS v. JENKINS & BICKNELL.

A transcript from the patent-office may be corrected by another transcript, duly certified.

A defective transcript cannot affect one that is complete.

It is not essential to the validity of a renewed patent, that the proceedings of the board should be stated at length.

It must appear that the subject of renewal was before the board, and that their decision was in favor of it.

The functions of the board are in their nature judicial. 4

Copies from the records of the patent office of assignments, are evidence.

The administrator of a deceased patentee has a right to apply for and obtain a renewal of it, in his own name. The patent law gives an exclusive right, but this is not a monopoly in its odious sense.

The act should be liberally construed to effectuate its objects.

In making a disclaimer of a part of an invention claimed, through the mistake of the person making it, he must state his interest in the patent.

By a rule of court, all formal objections to taking depositions must be indorsed on them before the trial.

A patentee has a *prima facie* right to the thing patented.

An administrator of a patentee may assign the patent which has been renewed in his own name.

The thing invented must be so described as to be distinguished and known.

If a machine be improved, the improvement must be so described as to distinguish the new from the old. Where this is not done, the patent is void.

Whether the thing invented be sufficiently described, is a question of law.

If in describing the invention, technical terms be used, peculiar to mechanics, evidence may be given as to the import of such terms, and a jury must decide.

Woodworth's patent is void, if it rest upon a claim to the improvement of a machine.

No improvement is stated so as to distinguish it from any other part of the machine.

But the description may sustain the patent, for the combination of certain mechanical structures.

Whether the description in Woodworth's schedule is sufficient to enable a skilful mechanic to construct the machine, is a question of fact for the jury.

The opinions of experts, or persons skilled in the structure of machines, is evidence.

Such evidence will be weighed by the jury, but in coming to a decision they will exercise their own judgments.

Where witnesses differ, as they usually do, on such subjects, the jury will not decide by their numbers, but the weight which the different witnesses are entitled to.

Where more is claimed by a patentee than he invented, he must, within a reasonable time, disclaim the part not properly claimed, or his patent will be void.

Brooks & Morris v. Jenkins & Bicknell.

Whether a disclaimer has been made within a reasonable time, is a mixed question of law and fact. Such a question is properly referred to the jury, with all the circumstances of the case, under the instruction of the court.

Until the act of 1837 was passed, no negligence could be attributed to the patentee or his administrator, in this case.

The invention, to be valid, must be new.

And this is equally the case, whether the invention claimed consist of an entire machine, or improvement of a machine, or a combination of several mechanical powers.

If the thing claimed to have been invented has been before made, or described in any public work, the discovery is not new, and the patent is, consequently, void.

A machine which is not the same in principle, does not infringe on the rights of the patentee.

To establish an infringement of a combined machine, all the parts which form the combination must be imitated.

The patent is for the entire machine as combined, and not for its parts.

The parts combined, being before known, are not withdrawn from the community.

Changing the position of a machine, does not alter its principle.

The principle of a machine depends upon its peculiar structure, by which a certain effect is produced.

Machines may differ somewhat in their structure, and yet be substantially the same.

If they are substantially alike in their structure, and produce a similar effect, they are in principle the same.

The word "substantial," as here applied, is not susceptible of a specific definition.

But the term is so used in courts of justice, and in the ordinary affairs of life.

Messrs. *Wright* and *Coffin* appeared for the plaintiffs.

Messrs. *Walker*, *Telford* and *Pugh* for the defendants.

OPINION OF THE COURT.

This is an issue directed out of chancery. The pleadings are filed and so made up as to try every material fact involving the validity of *Woodworth's* patent for planing boards, and also the renewal of that patent.

On the trial an objection was made to a certified copy of the patent, because it contained specifications and a drawing of the machine, which were not attached to a certified copy of the same patent, that was used at a former term on a motion for an injunction in this case.

The court held that as the copy offered in evidence was duly certified under the act of Congress, it was evidence. That if there were any inaccuracies in the copy, they might be shown by other certified copies. That a former and defective transcript would not affect a full and corrected copy.

It was objected that the fourth page of the schedule which relates to the renewal, does not show a compliance with the provisions of the statute.

The eighteenth section of the act of the 4th of July, 1836, requires—

1. That a patentee who desires an extension of his patent, shall make application to the commissioner of the patent office, setting forth the grounds thereof, and shall pay into the treasury forty dollars.

2. The commissioner is required to give notice in one or more newspapers, of the time and place where the application will be considered.

3. The secretary of state, the solicitor of the treasury, and the commissioner of the patent office, who constitute a board for that purpose, shall sit at the time and place designated in the notice, and shall hear the evidence for and against the extension; and if the board shall be of the opinion, that an extension of the patent is necessary to remunerate the inventor, the commissioner is required to extend the patent, by making a certificate thereon; which certificate, with a certificate of the board as to their judgment and opinion, shall be entered on record in the patent office.

The transcript of the renewal shows that the board, without naming them, had the application for the renewal before them, and that they decided in favor of an extension of the patent; on which the commissioner renewed the same, and certified, in the words of the act, that the extension, with the certificate of the decision of the board, was recorded in the patent office.

The transcript does not state the payment of the money, the notice, the meeting of the board, and the grounds of the decision, all of which it is contended must be stated to make the extension of the patent legal. That it is a special proceeding, which must be in strict accordance with the statute.

The proceeding before the board was not, necessarily, *ex parte*. Those who contested the right of Woodworth had a right to appear and oppose the renewal of the patent. Whether there was such opposition does not appear from this transcript, but it does appear that the subject was before the board, that they were in favor of extending the patent, and that their decision, with the extension by the commissioner, was recorded. This is no doubt the general form used in such cases, adopted by the patent office. It is less technical than is required in a judicial record, but the proceeding is summary, and does not require the same degree of particularity. The function of the board is, in its nature, judicial. Parties are brought before them, as well those who oppose the extension of the patent, as those who apply for it; and evidence on both sides being heard, the board pronounce their judgment.

The proceeding, therefore, is not like a tax sale, where every step must be proved, or the title fails. But it is in the nature of a judicial action where, jurisdiction being acquired, no subsequent errors can affect the title of a purchaser under execution.

This court cannot prescribe the form in which duties, devolved upon the executive branch of the government, shall be performed. We can only say whether enough appears to show that the subject was before the board, and their decision. And this, it appears to me, is sufficiently shown from the transcript.

The plaintiffs afterwards gave in evidence another transcript from the office, showing the notice by the commis-

sioner, the meeting of the board in pursuance thereof, their adjournment, and their decision in favor of the extension of the patent, after hearing evidence for and against it. Certified copies of assignments were offered in evidence and objected to, unless the originals were produced.

The court held that as all assignments of the patent, or any part of it, were required by the act to be recorded in the patent office, and as copies of the record are made evidence, the objection must be overruled. That the plaintiffs could not be presumed to have possession of any of the original assignments, except the one under which they immediately claimed. That assignment was offered in evidence and received without objection.

The question was raised as to the right of the administrator to apply for an extension of the patent in his own name.

This point was considered on the motion made for an injunction and decided in favor of the administrator, in whose name the patent was extended. That decision was not made without hesitancy, and the doubt expressed by Judge Story of its correctness, in the very recent case of *Woodward & Brown v. Gould*, which brought up the same question on the same patent, has somewhat shaken my confidence in the view formerly taken. As the point will be taken before the Supreme Court, I deem it unnecessary now to discuss it at large. My opinion, though shaken, is not changed. On a full discussion in the Supreme Court, I may find reasons to lead me to a different result. But it still seems to me, that the renewal of the patent in the name of the administrator, is so clearly within the spirit and policy of the act of 1836, it should be sustained.

There is nothing that the act requires the patentee to do which may not be done by his administrator, except the oath of the ascertained value of the invention, and of the receipts and expenditures, &c. But these receipts and ex-

penditures may be ascertained by the books of the patentee, or from other evidence. The avowed object of the law, in granting an extension of the patent, is to give an adequate remuneration to the patentee, for "his time, ingenuity and expense; he having satisfactorily shown to the board, that he had not received such a remuneration." Now, why should this remuneration be withheld from the heirs of a deceased patentee? If a patentee die after his invention, and before he obtains a patent, his administrator may apply for and obtain it. The same reason and justice require a renewal in behalf of the heirs, where the remuneration has been inadequate. It is true the act does not expressly so provide.

The patent law, it is argued, gives a monopoly, and, therefore, it should be strictly construed.

This law gives a monopoly, but not in an odious sense. It takes nothing from the community at large, but secures to them the greatest benefits. Distinguished as many names have become in different ages of the world, the names of Fulton and the inventor of the cotton gin, with all intelligent men, will be placed in the first rank of human benefactors. To remunerate inventors for "their time, ingenuity and expense," the law gives to them the exclusive right of selling their invention for a limited period. When we consider the inestimable advantages which result to the world from the "labor, ingenuity and expense" of inventors, so far from classing them with monopolizers, they should be regarded as public benefactors. And in order to secure to them the remuneration which the law provides, a liberal construction should be given to it.

Of this opinion was the late attorney general Grundy, who was consulted by the board under the act, as to the right of the administrator to renew the patent, before they acted on the subject. His opinion, which is found in Executive document, No. 123, twenty-sixth congress, is in favor

of the administrator in behalf of the heirs, to extend the patent. And it seems the board acted on this opinion, which coincided with their own judgment.

In the case of *Van Hook v. Scudder & Dayton*, in 1843, Judge Thompson, it being one of the last causes heard by him, and which is reported in pamphlet form, observes on this very question, "but it is further objected, that the patentee died before the patent expired, and that he never made any application for its extension; that the extension was granted upon the application of the administrator of the patentee, and that the law does not authorise an extension upon such an application. I am of the opinion that an administrator or executor may make the application for the extension of a patent where the grantee is dead, and that the patent may lawfully be extended on such an application."

In *Grant et al. v. Raymond*, 6 Peters, 241, in speaking of the power of the secretary of state to receive the surrender of a patent, which was void for a defective specification, and issue a corrected one, the late Chief Justice says, "it is true that the act of Congress contains no words which expressly authorise the secretary to issue a corrected patent," &c. "The force of this objection, and the argument founded on it, he says, is felt. If the new patent can be sustained, it must be on the general spirit and object of the law, not on its letter." And on this view of the statute, the Supreme Court sustained the corrected patent, and held that it had relation back to the emanation of the original patent.

Now this would seem to be a more liberal construction of the statute to effectuate its object, than is required to sustain the right of the administrator. Upon the whole, the former ruling of the court on this point will be adhered to, in order that the question may be made before the Supreme Court.

It is objected that the disclaimer of the invention of circular saws entered by the administrator is insufficient, as it does not state the interest he had in the patent.

The seventh section of the act of 3d March, 1837, provides, that where the specification is broader than the invention the patentee, his administrators, executors and assigns, may disclaim such parts as is not claimed under the patent—stating therein the extent of his interest in such patent. The administrator in whose name the patent was extended does expressly state, that he is the patentee, and refers to the patent as showing his interest. This is sufficient under the law; and the objection is, therefore, overruled.

Certain depositions offered in evidence were objected to, as two notices of taking them were given, and it does not appear under which the depositions were taken.

But the court overruled the objection, it being an objection as to the mode of taking the depositions, which before the commencement of the trial, had not been indorsed on the depositions as required by rule of court.

The deposition of Strong being offered in evidence, was objected to on the ground of interest, he having an interest with the patentee in the original patent.

It appears that Strong executed and delivered a quit claim of his interest to the administrator, some time before the administrator sold and transferred the interest now claimed by the plaintiffs. Strong, therefore, cannot be affected by the verdict in this case, and that is the true test of his competency. It is not perceived how he can have any interest in the renewed patent. The objection is overruled.

The evidence being closed, the cause was argued on both sides at great length and with much ability. The court charged the jury as follows:

The importance of this case, gentlemen of the jury, is shown by the time which has been taken up in its investi-

gation, and the great interest evinced by the parties concerned. It seems that suits have been brought under Woodworth's patents, in different parts of the Union, for infractions of his rights. This shows satisfactorily that the invention contended for must be of great value.

The patent, and the assignments under it, give to the plaintiffs a *prima facie* right, which must prevail, unless the defendants shall show it to be invalid, or that it cannot operate against them. The defence, as made before you, mainly rests upon five grounds.

1. That the assignment by the administrator, under which the plaintiffs claim, is invalid.

2. That the specifications are so defective as to render the patent void.

3. That the patent is void, because the patentee claimed more than he had invented.

4. That the specifications are taken mainly from Bentham's machine.

5. That the machine of the defendants, in principle, is different from that of the plaintiffs.

If any one of these grounds shall be sustained, it must defeat the action of the plaintiffs.

And first, as to the assignment by the administrator. If the administrator had a right to renew the patent in his own name, it would seem to follow that he must have the power to sell and transfer it. An administrator under the laws of New York, cannot exercise his functions beyond the jurisdiction in which his authority was conferred. He cannot bring suit in another state, except under the sanctions of the laws of such state. But the right in question was not acquired and could not be assigned, under the laws of New York. The act of Congress directs the mode in which the assignment shall be made, and where it shall be recorded. The administrator was recognised as the legal representative of the deceased, and the renewal of the

patent was granted in his name. This right is personal property, and, as a matter of course, would go to the administrator. The act of the government makes the administrator the trustee for the heirs of the deceased patentee, by the extension of the patent in his name, and he is responsible to the heirs for a faithful execution of his trust. Had the patent been renewed in the name of any other person, in trust for the heirs of Woodworth, he would have incurred the same responsibility.

The right in the hands of the administrator was a unit, extending throughout the United States, which, it seems to me, he had the power to sell and transfer in the state of New York, the same as any other personal property of the estate; and no reason is perceived why the right may not be conveyed in parts, so as to suit purchasers.

It is supposed, that to sustain the right of the assignees, they must show that this interest was appraised, advertised and sold the same as the other personal property of the deceased was required, by the laws of New York, to be appraised and sold. This formality need not be shown by the purchaser of personal property. He, taking possession of the property under a purchase from the administrator, can hold it, unless the transaction be fraudulent. Upon the whole, as no fraud is alleged or proved, the assignment of the right in question must be considered as valid.

I come now to the second ground, which is, that the specifications are defective. If this be so, the patent is void.

By the act of 1793, the applicant for a patent is required "to describe the thing invented in such full, clear and exact terms, as to distinguish the same from all other things before known, and so as to enable any person skilled in the art or science of which it is a branch, to make the same."

In requiring this specification, the law has two objects. First, as the grant gives an exclusive right, that the nature

and extent of it may be understood; and secondly, that when the exclusive right ceases, from the description, the machine may be constructed.

A question is raised, whether the thing claimed to have been invented is sufficiently described in the patent, is a matter for the determination of the court or jury. In its nature it is a question of law, for it depends upon the construction of a written instrument. If technical terms be used peculiar to mechanics in describing the invention, evidence may be heard in explanation of those terms, and in such case a jury may be necessary. If this point were ordinarily referable to a jury, the decisions on the same instrument would be as variable as the names of the parties. To produce uniformity of decision, the courts must give a construction to all written instruments. In this mode, by the application of known rules of construction, the specifications of a patent are construed and settled as regards the thing invented. Whether the description is so particular as to enable a mechanic to construct the machine, is a question for the jury. But unless the thing claimed to be invented, is so described as to be known, in the language of the statute, from every other thing, the patent is void. And this must be determined by the court.

What does Woodworth in his specifications claim to have invented? Does his invention consist of the improvement of a machine, or in the combination of known mechanical structures? If the former be claimed, then I have no hesitancy in saying the specifications are defective, and that the patent is void.

In his schedule, Woodworth says, "the plank, boards or other material, being reduced to a width by circular saws or friction wheels, as the case may be, the application of which to this purpose he claims to have invented." Now this is all he says of circular saws. How they are to be applied he does not say. Such a description, it would seem

to me, is so defective as to be regarded as surplusage. It is true circular saws have been disclaimed, and of course do not now constitute any part of the invention claimed. But independently of the disclaimer, they are not only so vaguely described and so disconnected with every other part of the patent, that I do not well see how they could have vitiated it. If he had said that the boards being reduced to a width by a handsaw, would any one have supposed that he claimed the invention of a handsaw? And I cannot distinguish between the two cases.

But Woodworth proceeds, the board "is then placed on a carriage resting on a platform with a rotary cutting wheel in the centre, either horizontal or vertical. The heads of circular plates fixed to an axis, may have one of the heads moveable, to accommodate any length of knife required. The knife fitted to the heads with screws or bolts, or the knives or cutters for moulding fitted by screws or bolts to logs, connecting the heads of the cylinder, and forming with the edges of the knives or cutter, a cylinder. The knives may be placed in a line with the axis of the cylinder, or diagonally. The plane or other material resting on the carriage may be set so as to reduce it to any thickness required; and the carriage moving by a rack and pinion, or rollers, or any lateral motion, to the edge of the knives or cutters on the periphery of the cylinder or wheel, reduces it to any given thickness." He does not claim the invention of cutter wheels, "knowing they have been long in use."

Now, if he claims an improvement of a machine, in what does that improvement consist? It is not the cutter wheels nor the planing irons fastened upon it. These were known long before. The carriage, rack and pinion were also known. What is claimed as new, and how is it distinguished from the old? There is nothing on the face of the patent or specifications, which can enable any one to say, what is new and what is old. If he has added some-

thing to a machine which is new, and which he claims as his improvement, he must describe it. But no such description is given. "The application of the machine to the planing, tongueing and grooving of boards, does not show what part of the machine is new." He can then have no shadow of ground on which to sustain his patent, for an improvement of a machine.

In such a claim it may not be necessary to describe the machine before it was improved; this is sometimes done, and it shows with greater distinctness the improvement. But it is essential that the part improved should be so distinctly stated, as to be distinguished from every other part of the machine. What has been said of the planing cutters, applies equally to the grooving and tongueing cutters. There is no statement of the part invented. To groove and tongue boards is an old operation. The cutters are not new. What then is invented? From the specifications, no one can answer this question.

It is not enough to give such a description of the machine patented as to show, by comparing it with other machines, what part has been invented. In *Evans v. Eaton*, 356, the Supreme Court say, "a description of the machine which mixes up the new and old, but does not describe what the invention is, cannot be sustained." Where an improvement on a machine referred to the previous patent of the machine, as showing the part invented, it was held sufficient; *Harmar v. Playne*, 11 East. 101. It is not enough that the thing designed to be embraced by the patent should be made apparent on the trial, by a comparison of the new with the old machine; *Dixon v. Mayor*, Con. Di. 553.

The specifications must be complete. No defects can be obviated by extraneous evidence at the trial. In this view it seems clear, and from the authorities cited, that Woodworth's patent for an improvement on the machine, is wholly unsustainable.

If the validity of the patent can be maintained, in this respect, it must be upon the ground that the invention consists in a combination of known mechanical powers, by which certain results are produced. In this combination consists the novelty. And I am inclined to think, that the specifications show with reasonable certainty, the combination of which the invention consists.

Plane bits are combined with the rotary wheel, by which, connected with the structure described, the planing operation is performed. "He claims as his invention the improvement and application of cutter or planing wheels to planing boards, &c., and also his improved method of cutters for grooving and tongueing," &c. And he describes how the above operations may be so combined as to plane, tongue and groove at the same time. His "improved method of cutters for grooving and tongueing," means the arrangement of such cutters as described in the body of the specifications. And the application of the planing cutters to planing boards, combined with the action of the other cutters, constitute the invention claimed.

Having considered the question of law as to the description of the thing invented, it will be for you, gentlemen, to decide whether the combination, of which the novelty consists, is so described as to enable a skilful mechanic to construct the machine. You have heard much evidence from machinists on this point.

Charles M. Keller, a witness, states, that he is a mechanical engineer, and has been connected with the patent office since 1822. Up to 1829 he assisted his father, who had charge of the models. He then succeeded his father. In 1836, under the new organization of the office, he was appointed examiner of patents, which office he still holds. His duties require him to examine all applications for patents, to see whether they are conformable to law. He is a practical mechanic, well acquainted with machinery.

The specifications of Woodworth's patent he has frequently examined, in connection with the drawing, and, in his opinion, a skilful mechanic, from the drawing and description could, without any invention, construct Woodworth's machine. The velocity of the moving parts of the machine, and their proportions, he thinks, need not be stated, as these should be left to the adjustment of the constructor.

William P. N. Fitzgerald, is an assistant examiner of patents with Mr. Keller, and he coincides with the above statement.

Dr. Locke has closely attended to the science of mechanics for forty years, and is a practical mechanic, having, in his philosophical experiments, been in the practice of constructing machines; he agrees in opinion, substantially, with Mr. Keller.

Messrs. Kellum, Wells, and sixteen other witnesses, all of whom are machinists, some of them having long been engaged in the construction of machines, and they agree in saying that a skilful mechanic could, from Woodworth's specifications, make a planing machine, in principle the same as Woodworth's.

On the part of the defendants, several witnesses have been sworn.

Dr. Jones—has long been editor of a periodical work chiefly devoted to mechanics. He was for several years superintendent of the patent office; and since then has been much engaged in the theory of mechanics. At the time Woodworth applied for his patent, he was at the head of the patent office. He then thought the specifications were defective, and so stated to Woodworth's agent. A skilful mechanic, in his opinion, could not, without the aid of inventive talent, from Woodworth's specifications, construct the planing machine claimed by him.

Messrs. Phillips, Straub, and five other witnesses, all of whom are experienced machinists, agree with Dr. Jones, as

to the defectiveness of Woodworth's specifications. Some of them, and particularly Mr. Phillips, give as a reason for their opinion, that the proportions of the different parts of the machine are not stated, nor the velocity of its movements.

Great respect is due to the opinions of professional men, on matters which relate to their professions. On such subjects, and on such subjects only, are the opinions of witnesses received as evidence. This rule applies as strongly to mechanics as to any other profession or business. From the facts stated by the witnesses in this case, you perceive that the science of mechanics is no contracted profession. It affords a range for the highest mental vigor, and requires as deep thought, as nice a discrimination, as any other pursuit. The lights of chemistry, and of the highest branches of the mathematics, are subservient to it. No one can be an accomplished mechanist, who has not studied with some success the laws of physics.

A model of Woodworth's machine, as claimed by the plaintiffs, is exhibited to you, and its parts have been explained. On this, as on every other question submitted to the jury, they will exercise their own judgments. You will weigh the opinion of the witnesses, but your decision should not turn upon their number. You are made acquainted with the circumstances under which the witnesses testified, and the opportunities they had of knowing the facts sworn to by them. These will be taken into view in considering their statements. In effect the defendants hold the affirmative on this point. The right of action by the plaintiffs can be defeated only, on this head, by showing that the specifications are so defective as not to enable a skilful mechanic to construct the machine claimed.

The utmost precision in the description of the machine is not to be expected, nor is it essential. Parts of machinery and processes generally known, need not be described. A

wedge, pulleys, rollers, rack and pinion, and other things, known to all mechanics, will be supplied by the mechanist, without stating their size or structure. Nor is it essential to state the proportionate parts of a machine, nor the velocity of its operations. These are matters of adjustment for the eye and judgment of the constructor. Whether a machine be large in its parts or small, its motion slow or quick, makes no difference in the principle of it. If a planing machine operate on a soft substance, its motion must necessarily be slower than a hard one. By a detailed description of things generally known, and not essential to the improvement or combination invented, the statement is rendered more prolix and less perspicuous.

The third ground of defence assumes, that the patentee claims more than he invented.

This involves the validity of the disclaimer made on the 2d January, 1843. The original patent expired the 27th December preceding; it was renewed on the application of the administrator the 10th November, 1842. It is earnestly contended that the right of entering a disclaimer was lost by an unreasonable delay. The original patent was dated in 1828, and the disclaimer was not entered until after it expired. This, it is insisted, shows gross negligence, both on the part of the original patentee and his administrator.

On the other side it is contended, that though the disclaimer may not have been made in a reasonable time, it does not, under the act of 3d March, 1837, defeat the right of action, but only the recovery of costs by the plaintiffs.

The seventh section of the act authorises a patentee, where "through inadvertence, accident or mistake," he has claimed in his specifications more than he has invented, to disclaim such part. And the disclaimer is considered and taken as a part of the original specification, provided it shall not affect any action then pending, "except so far as

may relate to the question of unreasonable neglect or delay in filing the same."

The ninth section provides, that when through "mistake, inadvertence or accident, more is claimed than invented, the patent shall be deemed valid for so much of the invention as shall be truly and *bona fide* the patentee's. And such patentee, his assignees, &c., shall be entitled to maintain a suit for an infringement; but he shall not recover costs against the defendant, unless he shall have entered at the patent office, prior to the suit, a disclaimer. "Provided, however, that no person bringing any such suit shall be entitled to the benefits of the provisions contained in this section, who shall have unreasonably neglected or delayed to enter at the patent office a disclaimer as aforesaid."

This section gives to the patentee a right of action for an infringement, though he has claimed more than he invented; and if a disclaimer of the part improperly claimed be made before the suit was commenced, with his damages costs may be recovered. If such disclaimer be not made, the judgment must be for damages without costs. But the proviso declares, "that no person bringing suit, shall be entitled to the benefits of the provisions of the section, who shall have unreasonably neglected or delayed to enter the disclaimer." Now is it not clear, that an unreasonable neglect or delay to enter the disclaimer, cuts off the patentee from all the benefits of the section, not only that he shall not recover costs, but that he shall have no right of action. This is, undoubtedly, the true construction of the section.

The question is raised, whether the unreasonableness of the delay to enter the disclaimer, is a question of law or fact. I think it is a mixed question of law and fact, and must be decided by the jury under the instructions of the court.

In deciding this point, gentlemen, you will take all the circumstances of the case which bear upon it, into consider-

ation. Until the act of 1837 was passed, which authorised the disclaimer, neither the patentee nor his representative was in default.

On the 14th of February, 1838, letters of administration were taken out on the estate of the patentee. How long before that time he died does not appear. From the time the administrator obtained an extension of the patent until the disclaimer was entered, five years and some months elapsed. It is proved that in 1835, on trial before the Circuit Court of the United States, Woodworth's patent was declared to be void, on the ground that he claimed more than he had invented.

Woodworth must have died in less than a year after the act of 1837 took effect. The administrator who represented the personal rights of the deceased, cannot be presumed to have been as well acquainted with the defect in the specification and the mode of remedying it, as the patentee. The jury will, therefore, consider the change in the legal ownership of the patent, and the causes which produced it; and they will require less vigilance from the administrator than from the original patentee. The disclaimer was made in six days after the expiration of the original patent.

No injury or hardship seems to have been suffered by any one, from the delay in making the disclaimer; certainly none could have been experienced by the defendants. The question then of negligence must be considered as between the government and the patentee. And it now rests for you to say whether, under the circumstances stated, the right of the patentee is forfeited by the delay of entering the disclaimer.

The fourth ground of defence is, that Woodworth's specifications were taken from Bentham's patent.

Gen. Bentham's patent was obtained in England in 1793, and a description of it is found in the "Repertory of Arts," published in London.

The sixth section of the act of 1793, provides, "if it appear that the thing secured by patent was not originally discovered by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery, the patent shall be void."

On this part of the defence the defendants hold the affirmative.

It is alleged that Bentham's machine is the same as Woodworth's. If it be in principle the same, then is Woodworth's patent void. The word principle is not used here in its general signification, but as applied to the structure of a machine. It means the operative cause by which a certain effect is produced. I observe the board before you is made smooth upon its surface, on one edge of it a groove is formed and on the other a tongue. This has been done by the machine before you in one operation. That machine is formed, as you perceive, by a combination of certain mechanical powers. This combination of powers is what is called the principle of the machine. Now it does not follow that the same effect may not be produced by a machine different in principle from the plaintiffs'. But where a similar effect is produced by a combination of the same mechanical powers, though the machines may be somewhat different in their structure, in principle they are the same.

On this part of the defence you have heard the statements of many experts, or persons skilled in the structure and operations of machinery.

Dr. Jones says, that rotary cutters operating in the same manner as Woodworth's, were in use many years before the date of the patent. He refers to Bentham's machine as published in the tenth volume of the "Repertory of Arts and Manufactures." I find there, he says, as clear a description of the principal operating parts of the machine now in use, and known as Woodworth's planing machine, as are found in his own specifications.

He says, in the cutters used by Woodworth there was not any thing substantially new. The cutters had not been so combined and arranged as to plane, tongue and groove plank simultaneously; but this combination or arrangement, he thinks, is not described by Woodworth.

R. C. Phillips, Isaac Straub, and two other machinists, agree with Dr. Jones.

Charles M. Keller, on the part of the plaintiffs, says that he has examined Bentham's specifications, as published in the "Repertory," and is of the opinion, that they do not describe a rotary plane similar to Woodworth's. He says Bentham describes a series of instruments for shaping wood and other materials, and now known under the appellation of burr cutters, and may be considered as circular saws of great thickness and of various forms; but not having the cutters so shaped and connected with the shaft or stock as to be capable of performing the operation of planing, but on the contrary, that of rasping or scraping.

Dr. Locke and four other witnesses agree with Mr. Keller that Woodworth's machine, as described by him, is essentially different from Bentham's.

In your retirement you will have the tenth volume of the Repertory, and a printed extract from it, containing, as is alleged, that part of Bentham's specifications which are similar to Woodworth's. By looking into this extract you will find that Bentham describes circular cutters, which may be considered, he says, "as so many plane irons." The cutter, he says, "should be made of one piece consisting of steel, or iron with steel welded on it, as far as it is necessary for strength and sharpness." He speaks also of a planing roller, and of cutters for tongueing and grooving. It would seem, therefore, that Bentham describes sharp cutters for performing operations, somewhat similar to those performed by the cutters described by Woodworth. But, I do not perceive in any part of Bentham's specifications,

that he has combined the planing, tongueing and grooving, at the same time. And if this be not done, as the plaintiffs' patent claims, a combination of the cutters, so as to plane, tongue and groove at the same operation, the machines cannot be identical in form or principle. If Bentham had described the different parts of Woodworth's machine with the utmost accuracy, and shown the operation of each, yet if no combined action be described, Woodworth's patent is not affected by it.

You will respect and weigh the opinions you have heard, under the same rule as stated to you on the second ground of defence. As finding against the plaintiffs on this ground is fatal to Woodworth's patent, you must be clearly convinced that the machines are the same in principle, before you find for the defendants. Doubts on this head will incline you in favor of the patent.

There remains but one more ground of defence, and that is, that the machine of the defendants is different in principle from that of the plaintiffs. If this be so, there is no infringement of the plaintiffs' right; and your verdict will be for the defendants.

The proof here devolves on the plaintiffs. They allege that the defendants have infringed their rights, and to obtain your verdict they must show it. Doubts under this head will incline you favorably to the defendants; as they are not to be deprived of a right which is common to every citizen, unless it shall clearly appear that their machine is substantially like the one claimed by Woodworth. To protect the defendants there must be a difference in principle. What the principle of a machine is, has already been explained to you.

You have been informed that the invention of Woodworth consists in the combination of certain known mechanical structures, by which boards are planed, tongued and grooved, in the same operation. If the defendants

have used in their machine any parts essential to this combination, less than the whole, there is no infringement. For the invention of Woodworth is not of the different parts which compose the entire machine, but their combination. By taking instruments known and used, to form this combination, he did not affect the common right to use those instruments. The use of them in their combined form, if new, is an infringement.

Parts of the machinery described or referred to, not essential to the combination, may be so considered by the jury. Woodworth speaks of a carriage, on which the plank is placed, to be moved towards the planing cutters, "by rack and pinion, rollers, or any lateral motion." The words "lateral motion," in mechanics, do not mean, as the term ordinarily signifies, a side motion, but a longitudinal one.

Every person who has seen a mill knows what is meant by the "carriage," and how it is moved by "a rack and pinion." In the contemplation of Woodworth, the carriage might be moved by rollers, or by any lateral motion. Now it must be admitted, that the "rollers," or "any lateral motion," are used in connection with the carriage. And the question here is, whether the carriage spoken of, is an essential part of the combination. It does not seem to be so treated by the patentee. We at once see, that the cutters, as arranged, to plane, tongue and groove, are essential. For by dispensing with either of these cutters, or by changing their position, the combined operation could not be performed. It is not so with the carriage; any other machinery which shall move the board against the cutters, will answer the same purpose. This is shown by the defendants' machine, in which the plank is moved by pressure rollers. There are rollers in Woodworth's drawing, which some of the witnesses say would perform the office of feeding rollers. They were considered as guiding rollers. By whatsoever means the plank may be moved against the cutters

is immaterial; but the necessity of such a movement is obvious to every one. The mode by which this is done, would seem to me not to change the principle of the machine. The machine itself may be moved by horse power, by water or by steam, and in the application of these powers the machinery must be adapted to each, but this change in the machinery would make no change in the combination invented. This, however, is a matter of fact for your consideration and decision.

The specifications of Woodworth represent the combined action of the machine in a vertical position, but the effect and the principle of it would be the same if the action were horizontal. This watch which I hold by the chain, operates vertically, I lay it upon the table, and the same operation continues horizontally. Time is marked with equal accuracy in both positions. You see then, by a change of position in the combined machine, its mechanical action is not affected.

Whether the machines of the parties before you are the same in principle, must depend upon their structure. The model of each is before you, and you have heard the opinions of skilful mechanists on the subject.

Samuel Keller, called by the plaintiffs, states, that he has examined the specifications and drawing of the defendants' machine. The plane irons are attached to a wheel or arms on a shaft, and so inclined that the cutting edges of the planes, in their rotation, generate a cone. And he says this machine in principle and mode of operation, is similar to Woodworth's. 1. In the method of planing. 2. In the method of holding down the board to the bed on which it rests. 3. In the employment of the tongueing and grooving instruments in combination with the planing wheel.

Dr. Locke says, there is some difference in the structure of the two machines, but that there is no difference in principle. That the same mechanical powers are employed in

both machines, and the result is substantially the same. Nine other witnesses, all of whom are machinists, agree with Dr. Locke.

R. C. Phillips, a witness called by the defendants, states, that he has carefully examined both machines, and that there is a difference in the principles of the two machines, as well as in their structure. He considers this difference mainly to consist in the action of the planing wheels. The action of Woodworth's cutters is horizontal, and they strike the face of the board at right angles. That the defendants' cutters, from the inclination of the shaft on which they are placed, strike the board diagonally, cut a larger space on it, performing, to use his own words, a shaving operation. That this wheel works faster than Woodworth's, and requires less power. In this he thinks it has been much improved, and is better than the plaintiffs. Four other witnesses agree, substantially, with Mr. Phillips. This closes the evidence on both sides. And now, gentlemen, the duty devolves upon you to decide this important controversy.

If you find the defendants' machine is the same in principle as the plaintiffs', with some addition, it will be your duty to find for the plaintiffs. But if there is a substantial difference between the two machines—a difference in principle, you will find for the defendants.

An objection is made to the use of the term "substantial," as having no definite signification. It is true, the word as applied in this case is not susceptible of an exact definition. But it is generally used in the same sense. No word is more familiar in the action of a court of justice. And in a larger sense it applies to all human affairs. In the exact sciences we look for precision. But beyond the mathematics, in human transactions, we may be said to reach the truth more by approximation than by absolute demonstration. A pleading in a civil or criminal case may be substantially good, though it may not be technically formal.

An instrument substantially described in a declaration or indictment, may be given in evidence. We look more to the substance of things than their forms. In asking you, then, to determine whether the machines are substantially alike or substantially different, you are called to perform only a common duty; not as regards the questions before you so much, as in the discharge of your ordinary duties in life.

Should you find for the plaintiffs no more than nominal damages are claimed.

NOTE.—Since the above charge was delivered, a newspaper report of a decision of Mr Justice Story in *Woodworth et al. v. Sherrer*, which was a motion for an injunction, founded on the renewed patent of Woodworth, in which he remarks, “as to the second point, that on the fullest reflection he had come to the opinion, that Mr. Justice M’Lean was right in his decision, that an administrator was competent to apply for and receive this grant. That to hold otherwise would be going contrary to the whole spirit and policy of the patent laws.”

STANSBURY v. TAGGART.

A purchaser of land, with a full knowledge of the title and of certain pretended claims, who receives a deed, cannot withhold a part of the purchase money on account of the alleged defect.

He must seek redress on the warranty, should he suffer damage by the adverse claim.

Until the adverse claim shall be established, there is no ground to injoin the recovery of the purchase money.

Where a purchase is made of land to be paid for in carpenter’s work, the deed to be made, when the work was done, until the work is done, there is no ground on which to claim a conveyance.

A possession under such a purchase without deed cannot, by lapse of time, ripen into a title.

The purchaser’s possession is the possession of the vendor, the same as landlord and tenant.

But possession under a deed is adverse.

The nature of the possession is always ascertained, when the statute or lapse of time is pleaded.

Stansbury v. Taggart.

A tax title is utterly void, if the land be sold in a wrong name, under a wrong assessment.

Mr. Stansbury for plaintiff.

Mr. Taylor for defendant.

OPINION OF THE COURT.

THIS is an injunction bill, in which the complainant asks that certain incumbrances paid off by him, on a tract of land purchased from the defendant, shall be set off against a judgment for the purchase money. In the action at law, 2 M'Lean's Rep. 543, the complainant set up the same matters in defence, but the court held that, as the defendant Stansbury had accepted a deed for the land, with a full knowledge of the alleged incumbrances, and having long been in possession, he could not set up this defence in an action for the consideration money. The main facts in the present case are not dissimilar to those in the case at law.

In 1830, one Graham purchased from Cadwallader Wallace, the agent of the defendant, a tract of land. The complainant purchased Graham's interest, and became responsible for the payment of the purchase money.

In his letter to Wallace, the agent, the 26th March, 1833, the complainant says, "having purchased from Mr. Graham his right, I am authorised to receive a deed for lot 4, upon my paying \$401 67, with interest," &c.; "and this I am willing to pay on receiving a good title to the land." He further remarks, that "on the 27th November, 1809, Alexander M'Laughlin made an agreement for the sale of the land with Lemuel Kirkland, who shortly after took possession, and has held possession ever since. And although he does not pretend that he has performed the work mentioned in the contract, or that he has paid any money to M'Laughlin, or to any other person, he now claims the land as his own," &c. "Kirkland's chief reliance is upon his peace-

able possession of twenty-three years;" and he remarks, "I am of opinion, that neither the statute of limitations, or the tax sale, will protect Kirkland against the claim of the true owner of the land. But from the time which has elapsed since the date of the contract, the law may raise a presumption that the contract has been complied with.*" But he says, "I am nevertheless willing to pay the money due on your contract with Graham, and receive a general warranty deed; or I will take a quit claim, pay one half of the money due, and run all risks." He proposed to institute a suit for the recovery of the land, and if he should fail, he presumes "that he shall have no difficulty in obtaining the repayment of the money, interest, &c., from the grantor."

In his letter to the agent, dated 16th July, 1833, he says, "it will be very difficult to get along with an ejectment in the name of Taggart, as the large parchment deeds would have to be sent on to Philadelphia," &c.; and he suggests, that the difficulty would be obviated by executing a deed to him, and he gives a description of the property, which he requests may be inserted in the deed. By a letter, August 9th ensuing, the complainant requests that the deed might be executed to his son, who would execute a mortgage to secure the payment of the purchase money. On the 20th of the same month, Wallace, as the agent of Taggart, executed a deed for the land, containing covenants of a general warranty, and against incumbrances.

On the 27th of November, 1809, Alexander M'Laughlin, as appears from a contract under seal, sold lot No. 4, to Samuel Kirkland, for the consideration of five hundred and ten dollars, to be paid in carpenter or house joiner's work, at Philadelphia prices, when required. When payment was made, a deed in fee simple was to be executed. Shortly after the contract of purchase, Kirkland entered into the possession of the land, built a cabin, and cleared about thirty-five acres. He continued in possession twenty-three

years. Some time after the contract, Kirkland was employed as a carpenter, on a house which M'Laughlin was building in Zanesville, but he was discharged from the work. It does not appear how long he worked, nor for what cause he was discharged. That he could not have labored on the house more than a few days is probable, and it does not appear that he has ever paid, or offered to pay, in work or otherwise, the purchase money.

On the 31st of December, 1832, the land was sold for taxes to James Holmes, for twelve dollars and thirty-five cents, as the property of William Rodgers and John Holmes. Whether the complainant instituted an action of ejectment does not appear; but it is presumed he did not. He purchased the claim of Kirkland, as he alleges, for four hundred dollars, and the tax title for nineteen dollars. These sums, with the interest thereon, are claimed as an equitable off-set against the judgment.

At the time M'Laughlin sold the land to Kirkland, he owned only one third of it—one third being owned by Taggart, and the other by Grey and Taylor. It is proved that M'Laughlin, at the time of the contract with Kirkland, had a power of attorney to sell from the other proprietors, but, in the sale, he does not assume to act as their agent.

The purchase of the claim of Kirkland by the complainant was made, not only without the knowledge of Taggart, or his attorney, but against an express arrangement on the subject. On the repeated applications of the complainant to Wallace, the agent, the deed was executed before the consideration money was paid, in order that an ejectment might be brought against Kirkland. The deed being obtained, no suit was instituted, but Kirkland's claim was purchased. Under such circumstances, whether in law or equity, the transaction should be scrutinized, and no allowance made to the complainant, unless it shall clearly appear that the incumbrance purchased, was *bona fide*, and could

be legally enforced. With this view we will examine the claim of Kirkland.

That under the contract he had no right to a conveyance from M'Laughlin is clear. No part of the consideration is pretended to have been paid, and, until such payment, the deed, by the terms of the contract, was not to be executed. It is true payment was to be made in work when required, but this does not change the principle of law applicable to such contracts. Suppose the consideration was to have been paid in money when required; could the purchaser before such payment, or a tender of it, demand a conveyance? The only excuse alleged by the complainant in this respect, for the default of Kirkland is, that he was discharged from laboring on the house of M'Laughlin, in Zanesville, and has not since been required to do work as a carpenter or joiner. The circumstances under which he was discharged, are not stated. He may have been found incompetent, unfaithful, or worthless, which not only authorised his discharge, but rendered it necessary. But however this may be, there is no excuse given for the non-performance of his contract by Kirkland, on which can be founded an equitable claim for a title. He had been in possession twenty-three years, under a contract of purchase, no payment having been made, and this was all his pretence of right. The indifference shown by Kirkland, as to the payment of the consideration, coupled with the lapse of time, effectually barred his claim for a title. After the lapse of twenty-three years, except under extraordinary circumstances, it is too late for the vendee to ask a decree for a conveyance, on the offer to pay the consideration. The changes in the value of the land, and the interest of the vendor, as in this case, constitute an insuperable objection to the favorable action, in his behalf, of a court of equity.

The principal stress in the argument is laid on the pos-

session of Kirkland. It is insisted that that possession ripened into a perfect title under the statute of limitations.

M'Laughlin owned only one third of the land sold, being a tenant in common with Taggart, Grey and Taylor. And although he had a power of attorney from his co-tenants, to sell the lands generally, in Ohio, in which they were interested, yet in making the sale in question, he did not act under this power. He sold the land in his own right. Now it is clear, as against M'Laughlin, the statute did not run. Kirkland's possession was not adverse to M'Laughlin's right. The entry being made under him, until the payment of the consideration and the execution of the deed, the possession of Kirkland was the possession of M'Laughlin. In this respect, the rule of law is the same, as between landlord and tenant.

But it is insisted, that if the possession did not protect Kirkland against M'Laughlin, it was adverse to his co-tenants. And this is attempted to be sustained on the ground that the sale by M'Laughlin was an ouster of his co-tenants; and that the statute begins to run from the time of such ouster. If this be admitted, does it follow that the benefit of the statute enures to Kirkland? He enters, in effect, as the tenant of M'Laughlin, claiming the land, it is true, by purchase from him. He claimed the land as his own, but he claimed it only as a purchaser, without deed, not having paid any part of the consideration. His purchase must necessarily be referred to as showing the nature of his entry and claim. Had he entered under a deed from M'Laughlin, his possession would have been adverse to all the tenants; but, in many respects, bearing the relation of tenant, he can set up no title hostile to that under which he entered. He could not protect himself by purchasing a title paramount to M'Laughlin's. Failing to comply with his contract, he was liable to be turned out of possession, and made responsible for the rents and profits of the land while

he occupied it. A claim of protection under the statute need not be sustained by a valid title; but the claimant must act, *bona fide*, in asserting an adverse title. He must believe that his title is valid. If he enter under another's title, he asserts such title, and not his own. This is peculiarly the case with a tenant, and also of a purchaser who has neither received a deed nor paid any part of the consideration.

It appears that after the purchase by Kirkland, a partition of lands owned by M'Laughlin, Taggart, Grey and Taylor was made, and the tract now in controversy was allotted to Taggart. He, as well as the other tenants, being non-residents, were within the savings of the statute; so that if Kirkland's possession were adverse to all the tenants, except M'Laughlin, still the statute does not operate. This is conclusive as regards the assertion of any title by Kirkland under the statute. Lapse of time, under the circumstances, cannot avail him. All presumption of payment is rebutted by admitted facts, and gross negligence rebuts any equitable considerations favorable to the purchase.

But it is said if Kirkland had been ejected from the premises, that he would have been entitled to compensation for his improvements. In estimating this compensation, the rents would have been taken into the account, and a moderate computation of rents would, in twenty-three years, have overbalanced a reasonable charge for improvements. Little more than thirty-five acres of ground were cleared, and the buildings were cabins of the most ordinary kind.

There is no evidence that the tax title, for which the sum of sixteen dollars was paid by the complainant, was valid. The land seems not to have been sold as the property of the owners, but as belonging to other persons. The mere certificate of sale, which upon its face seems to be invalid, without any other evidence of its legality, did not constitute

an incumbrance which the complainant, by paying, could charge against the vendor. A payment being voluntary, and without notice to authorise such a change, must appear to have been made, to remove a legal incumbrance.

The deed executed by Wallace to the complainant, contained covenants of general warranty, and against incumbrances. After receiving it without objection, and holding under it for years, it is too late to object that it did not contain a covenant of seizin. The deed was obtained by the complainant, before he paid the consideration, to enable him to bring an action of ejectment against Kirkland. This allegation is made by the complainant, and it shows why the covenant of seizin was not inserted, if the complainant, under the contract with Graham, had a right to require it.

Under all the circumstances of the case, it appears that the claim of Kirkland had no foundation in law or equity, and that such is the character of the tax title, and consequently the payments made by the complainant, to remove these pretended incumbrances, were made in his own wrong, and cannot constitute a charge against the defendant.

The injunction is dissolved, and bill dismissed at the complainant's costs.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—OCTOBER TERM, 1844.

BAGLEY v. YATES & PRENTISS.

Where a deputy marshal receives money on a judgment, after he has returned the execution, he may be attached, on a neglect to pay over the amount in pursuance of the order of the court.

The marshal is responsible for the acts of his deputy, done in the line of his duty. But when the deputy does not so act, the marshal is not responsible.

The deputy is an officer of the court, and may be held responsible as such.

Seaman for the plaintiff.

Abbott for defendants.

OPINION OF THE COURT.

THIS is a motion for an attachment against Alexander H. Stowell, deputy of the late marshal, Conrad Ten Eyck. The affidavits showed that the judgment in the above case was rendered in November, 1838, for \$832 50 damages, besides costs. That execution was issued the 23d November, 1838, which was delivered to Stowell, as deputy marshal. That said Stowell collected of the defendants \$80, January 3, 1839; \$200, 28th February, 1839, and paid over to the plaintiff's attorney, \$247, and afterwards returned the execution, made on the execution \$247, and paid the same to the plaintiff. After the return of the execution, he received and receipted for \$519 75, some of which he paid over to the plaintiff, but retained a part in his own hands, after deducting his fees.

The marshal is authorised by statute, to appoint one or more deputies, who are required to take an oath of office, and they are recognised as officers of the circuit and district courts, and liable to be removed by them.

It is objected that this proceeding should be had against the marshal, who is responsible for the acts of his deputies.

The marshal is responsible for the acts of his deputies, while acting in the line of their duty, but beyond this he is not responsible. In the case before us, the deputy received the principal part of the money after the return of the execution, when he had no authority to receive it, a part of which has not been paid over. For this act the marshal cannot be held responsible. The deputy is an officer of the court, and is subject to its power as such. He has been ordered to pay over the money in his hands, in the above case, which he has not done. And the question is, whether he is not liable to be attached for the disobedience.

The deputy acts in the name of the principal, and it is contended he is not liable to be sued by the plaintiff, whose money he collects on execution. In such case, the principal or his deputy is liable, at the option of the plaintiff. Certainly the plaintiff is not bound to look to the deputy, but may proceed against his principal. But, as before remarked, he cannot take this course where the acts of the deputy, complained of, were not done in the line of his duty.* Having received the plaintiff's money, under the pretence of an authority, by virtue of his office, he is responsible to them. The payment by the defendant, to the deputy, not being authorised, did not discharge him, but having received money on account of the plaintiffs, they

* It is laid down in *Knowlton v. Bartlett*, 1 Pick. 271; *Marshall v. Hosmer*, 4 Mass. 69; *Bond v. Ward*, 7 Mass. 123; and in other cases decided in Massachusetts, that the sheriff is liable for the acts of his deputy done under color of office, whenever the deputy would be liable for the same acts. We are not prepared to admit this doctrine to the extent as laid down; but if it were admitted, it does not affect the personal liability of the deputy.

may compel him to pay it over to them. And, as he acted under the assumed authority of the process of this court, he must be held responsible in this mode of proceeding.

It would be disreputable to the court, and to the institutions of justice, if in such a case, the court should not afford a summary remedy against one of its officers. In the case of the *United States v. Mills*, 2 Brokenborough, 9, the Chief Justice held, that a deputy marshal might be attached for not paying over moneys collected by him. If a deputy marshal, clerk or attorney, receive in such capacity, money which he refuses to pay over on the order of the court, he may be attached. An attachment is grantable against an officer of the court, where he misdemeanors himself in office. 1 Bac. Ab. Attachment A.

The court grant the attachment.

WYMAN & WYMAN v. FOWLER.

If a count in a declaration contain sufficient averments, surplusage will not vitiate it.

Goods received, which are to be sold at certain prices, or the goods returned on demand; if sold, and the money received, no special demand need be alleged.

If the action were for a failure to return the goods, a special demand necessary.

Mr. *Howard* for plaintiffs.

Mr. *Frazer* for defendant.

OPINION OF THE COURT.

THIS is an action of assumpsit. The defendant demurs to the seventh and eighth counts in the declaration.

The seventh count charges that the plaintiffs agreed to deliver to the defendant, "a certain quantity of goods and

merchandise, described in certain invoices, amounting to the sum of nine hundred and twenty dollars and forty-seven cents, on consignment, on terms that the defendant should account for all articles sold at prices named in said invoices, or to return and redeliver said goods to the plaintiffs, when demanded by the plaintiffs, without commissions." The goods were delivered to the defendant, and the declaration avers, that they were sold on the 1st of August, 1842, at the prices named in the invoices, and that the sum of nine hundred and twenty dollars and forty-seven cents, was received by the defendant. The breach alleges, that the money has not been paid nor the goods returned. The following grounds of demurrer are assigned:

1. "No averment that the defendant had made collections from the sale of the goods." The declaration states, that the goods had been sold for the prices stated in the invoices, and the money received; consequently, there was no necessity for the above averment.

2. "That no special demand or request was made to account with plaintiffs for said goods or their avails." Had the goods not been sold, and the action were brought for a failure to return them, a special demand must have been averred, as by the contract the goods were to be returned on demand being made. But the sale of the goods, as averred, rendered this demand unnecessary. The goods having been sold, could not be returned. The general request is sufficient for the money received.

3. "No substantial cause of action, promise or undertaking, set forth in this count on the part of the defendant; and the breach in the declaration is insufficient, and not co-extensive with the alleged agreement."

There is a cause of action in the delivery of the goods for sale, and an allegation of their sale, at the prices agreed upon, and the receipt of the money. The breach alleges the non-payment of the money, or the return of the goods.

As the goods were sold, it was not necessary to allege in the declaration that they were not returned. And this part of the breach may be considered as surplusage, and be disregarded. The other breach covered the contract, by averring that the defendant had not done that which, by the contract, he was bound to do.

4. That the bills referred to in the count are not set forth, nor the particular goods sold. In this respect, the count is not defective. A general description is sufficient. There is unnecessary verbiage in the count, but there is enough in it to sustain the action.

The eighth count is for an invoice of goods sold, amounting to the sum of four hundred and seventy-one dollars and thirty-four cents, delivered to the defendant on the same terms as stated in the seventh count. And as the eighth count is similar to the seventh, and the grounds of demurrer substantially the same as the above, they will not be further examined. The demurrer to both counts is overruled.

THE UNITED STATES v. BALLARD.

The 31st section of the Act of Congress of 30th April, 1790, applies to offences committed after, as well as before, the act.

The indictment, or information, must be found within the limitation of the statute.

An indictment within the two years, on which a *nolle prosequi* was entered, cannot save the statute.

A second indictment has no connection with the first.

In no sense can the second be considered as an amendment of the first.

Mr. *Bates*, district attorney.

Messrs. *Walker* and *Douglass*, for defendant.

OPINION OF THE COURT.

This is an indictment for perjury, charged to have been committed 26th February, 1842, in the oath made by the defendant to his schedule in bankruptcy, filed on that day. The indictment was found the 18th October, 1844, two years and seven months and some days, after the perjury is charged to have been committed. A previous indictment, charging the same offence, was found February 1st, 1844, on which a *nolle prosequi* was entered.

The facts, as above related, are submitted by the counsel; and a question is raised, whether the limitation of the statute had not run, before the pending indictment was found.

The act of the 30th April, 1790, 31st section, provides—“Nor shall any person be prosecuted or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine and forfeiture aforesaid.”

This limitation extends as well to offences created after, as before the act. *Adams v. Wood*, 2 Cranch, 336; *Jones v. United States*, 89.

Looking only at the second indictment, there would seem to be no doubt that the statute bars the prosecution, as more than two years had elapsed, after the offence was committed, before the indictment was found. But it is insisted, that the first indictment being found within the two years, and the second being found shortly after the abandonment of the first, prevent the bar under the statute.

The first indictment had no connection with the second. In no sense can the second be considered as an amendment of the first. When a *nolle prosequi* was entered upon the

Williams v. Baxter.

first indictment, the prosecution was at an end; and the second indictment must be considered as the commencement of a new prosecution. The statute does not refer to the exhibition of the charge, but to the indictment or information. The charge, therefore, must be sanctioned by the grand jury, in one of the forms designated, within two years after the offence has been committed. This not having been done in the present case, the act must be held to bar the prosecution.

WILLIAMS v. BAXTER.

Where funds are placed in the hands of an agent to make purchases, and a balance remains in his hands, after the purchases are completed, he is not liable to pay interest on such balance before the commencement of the suit, unless a special demand was made.

Mr. Chipman, for plaintiff.

Messrs. Lathrop and Duffield, for defendant.

OPINION OF THE COURT.

Defendant acted as the agent of the plaintiff in purchasing wheat. He showed receipts, amounting to the sum of \$23,000 for purchases, leaving in his hands \$3,000 of advances made by plaintiff. For this balance this action is brought, and the only question is, shall the defendant be held liable for interest, and from what time.

No demand for the payment of this balance is proved to have been made, but the plaintiff insists that he is entitled to interest from a reasonable time after the last credit. The court instructed the jury, that interest should be computed from the commencement of the suit, as no special demand had been made.

Hollingsworth v. the City of Detroit.

HOLLINGSWORTH v. THE CITY OF DETROIT.

By the English decisions, compound interest is not recoverable, except in special cases.

It is not usurious, but is supposed to be pernicious.

Interest, when due, may be demanded and recovered. But by the English rule, which has been adopted by some of the courts in this country, a note for the interest is not valid, unless given after the interest is due, and for the payment of interest that may afterwards accrue.

The authorities in this country, on this subject, are conflicting.

Reason and justice require the performance of contracts, not entered into in violation of law.

The interest in this case was made payable, in the coupons, to bearer.

They passed by delivery, which was intended to give them currency.

This promise is within the 9th section of the Michigan statute, which gives interest.

And interest is recoverable on the sums named in the coupons, if not paid when due.

Joy and Porter and Abbott for plaintiff.

Harbough and Lee for defendant.

This case was submitted to the court on the following facts.

Hollingsworth is the holder of a considerable amount of the bonds of the city of Detroit, payable at a distant period, with interest, payable semi-annually, on the 1st of May, and the 1st of November. Coupons, as they are called, are attached to these bonds, each of them for the interest, as it falls due, being a coupon to each bond for each semi-annual instalment of interest.

These coupons are in the following terms, varying only as to the period when they fall due. "The city of Detroit acknowledges that there will be due Robert Hollingsworth, or bearer, on the 1st day of May, A. D. 1841, thirty-five dollars, being for semi-annual interest on bond No. 44, of the seven per cent. loan." Signed, H. Howard, Mayor, &c.

The plaintiff holds many thousand dollars in these bonds, and a large amount of coupons in arrear. These coupons are the subject of this suit, and the controversy arises upon the question, whether the judgment of the court shall be for the amount of the coupons without interest, or whether interest shall be added from the time they became due.

The 7th, 8th and 9th sections of the act of Michigan, which regulates interest, are as follows. 7th section, "The interest of money shall continue to be at the rate of seven dollars and no more, upon one hundred dollars, for a year, and at the same rate for a greater or lesser sum, or for a longer or shorter time." 8th section, "Interest may be allowed and received upon all judgments at law, and upon all decrees in chancery, for the payment of any sums of money, whatever may be the form or cause of action or suit, and such interest may be collected on execution." 9th section, "In all actions founded on contracts, express or implied, wherever, in the prosecution thereof, any amount of money shall be liquidated, or ascertained in favor of either party, it shall be lawful to receive and allow interest until payment thereof."

If this question be examined on the broad basis of equity and reason, uninfluenced by the decisions of courts, no one could entertain a doubt on the subject. That these coupons are not usurious is clear. No more than the legal rate of interest is claimed on them, after they became due and the city failed to pay them. The coupons were negotiable, by delivery; and no question is made whether, when due, a demand of payment was made, or whether such demand was necessary. The point not being raised, need not be considered.

As a new proposition, it would seem to be unaccountable how any one could doubt that the holder of these coupons, negotiable by delivery and payable to bearer, should not be entitled to receive interest on default of payment, the same as in every other case, on a failure to pay a certain

sum. The coupons are separated from the bonds, and must be considered as a promise to pay a certain sum of money at a future time, on the consideration of interest then due. Now, it is admitted that such an instrument would be valid, and if not paid at maturity would draw interest, if given after the interest is payable; but not valid, it is contended, as to the payment of interest, if executed before the interest is payable. The promise of payment is substantially the same in each instrument, and the only sensible distinction is, that in the one case the promise is to pay a sum for interest then due, and, in the other, when it shall become due. In both instruments the sum is specific, and the consideration a good and valuable one—the accumulation of interest. To make any distinction between these cases, would seem to savor more of legal nicety than sound logic. The reason given in the decisions is entirely unsatisfactory.

In *Connecticut v. Jackson*, 1 John. ch. 13, Chancellor Kent says that, “it may be considered as a doubtful question, on the ground of the ancient authorities, whether the assignee of a mortgage, on a bill to redeem, be not entitled to interest on the whole sum which he paid. Nor are the imperfect cases, in the reign of Charles II., uniform or consistent, even on the general question, whether compound interest can be allowed, for the dicta are both ways.”

But the cases decided since the revolution of 1688, in England, Chancellor Kent says, have established the rule, that, except in particular cases, governed by special circumstances, compound interest was not allowable.

In the case of *Waring v. Cunliffe*, 1 Ves. jun. 99, Lord Thurlow said, “my opinion is in favor of interest upon interest; because I do not see any reason, if a man does not pay interest when he ought, why he should not pay interest for that also. But I have found the court in a constant habit of thinking the contrary, and I must overturn all the

proceedings of the court if I give it. This is the general rule, but it is competent to the court to order even compound interest when justice requires it." *Nightingale v. Lawson*, 1 Brown's ch. 433; *Danford v. Danford*, 12 Ves. 127; *Raphael v. Bachm*, 11 Ves. 11.

In cases of trust, a court of chancery will direct the trustee to pay interest upon interest, where he has used the money in his hands and neglected to account. Compound interest is not forbidden by the statute against usury, but it is held to be iniquitous, and chancery will not decree it, though agreed to by the parties. 2 A. K. Marsh. 335, 339; *Mowry v. Bishop*, 5 Paige, 98; *Lewis v. Bacon*, 3 Hen. & Munf. 89. It will be allowed on a special agreement in writing, prospective in its operation, and entered into after the lawful interest has become due. *Van Benshoten v. Lawson*, 6 John. 6, 331.

In the case of *Faber v. Cantfield*, 3 Hammond, 17; "the debtor agreed, in 1807, that upon the principal and interest then due, he would pay the interest annually. This agreement he failed to perform. In 1812, he acknowledged the existence and obligation of the agreement, and settled the account according to it, and gave his notes for the amount, and the mortgage to secure the payment." This was set up against the mortgage, but the court held the interest was rightly paid. And again, in *Watkinson v. Root*, 4 Hammond, 372, where the parties made a contract in April, 1826, by which the defendant agreed to pay to the plaintiff \$4,586 in four equal annual payments, with lawful interest, to be paid annually; an action was brought for the interest, and the only question was, whether interest was allowable upon the successive annual charges of interest, after they fell due. And the court say, such a contract is prohibited by no statutory provisions, and we see no reason why it should not be enforced. New Hampshire Rep. 179, is to the same effect. Where regular accounts

are settled from time to time, interest on interest is allowed. 3 Brown's ch. 440. Where bankers furnish an annual account without objection, an agreement shall be presumed that the balance of principal and interest shall bear interest; 1 Ball & Beatty's Rep. 422. Accounts between merchants may be settled every half year, on the principle of compound interest. 9 Ves. 223, 224. It may be allowed where there is a contract implied, or it is the usage of trade; 2 Ves. 16, 17, 20.*

A promissory note given for the payment of interest upon interest, which had previously become due, is valid. *Wilcox v. Howland*, 23 Pick. 167. In the same case it is said, "if a party holding a note payable at a future time, with interest annually, lets the time run by without demanding interest, he cannot afterwards, in an action on the note, recover compound interest." Yet he may sue for each instalment of interest as it becomes due; *Cooley v. Rose*, 3 Mass. 221; *Greenleaf v. Kellogg*, 2 Mass. 568. "It is not illegal to stipulate for compound interest, or that interest as it becomes due shall be converted into principal, and carry interest." *Kellogg v. Hickok*, 1 Wend. 221. If the debtor, instead of paying interest when it becomes due, gives his note or bond for it, there is no legal objection to enforcing the payment. . *Ib.*

From the above citations, it appears that the earlier decisions in England had not clearly settled the rule in regard to compound interest. There are *dicta* both for and against it. But the more modern doctrine in England is, that "compound interest cannot lawfully be demanded and taken, except upon a special agreement, made after the interest

* In *Hammond v. Bell*, 5 Barn. & Al. 34, Chief Justice Abbott said, "it is now settled, that a party advancing money to another, is entitled to charge interest, and at the end of every year, then to add the principal to the interest." 1 Baldwin, 536; "compound interest is not illegal, and may be recovered on express promise, or on one implied by law, as a part of the contract."

has become due.” And that a note given for the payment of interest before it has accrued, is not valid. This doctrine was laid down and followed by Chancellor Kent, in 6 John. ch. above cited. It is founded upon the consideration, that “interest upon interest, promptly and incessantly accruing, would as a general rule, become harsh and oppressive. Debt would accumulate with a rapidity beyond all ordinary calculation and endurance. Common business cannot sustain such overwhelming accumulation. It would tend also to influence the avarice, and harden the heart, of the creditor.”

Now it is admitted, that there is no law prohibiting such a contract. But the courts have adopted the rule from notions of policy. All the authorities admit that the interest, payable annually or semi-annually, may be demanded and recovered as it becomes due, and that a note given for it may bear interest. And yet, when the loan is first negotiated, an agreement to pay interest on the interest after it becomes due, is not valid. The reasons for this distinction are unfounded in fact. It is supposed that the interest being due, and the debtor being pressed for its payment would be less likely to yield to the avarice and hardness of heart of the creditor, than when the loan was at first negotiated. Is not the converse of this true? When the loan is made, the borrower is generally sanguine that he shall be able to pay the interest, at least, as it shall become due. And if he fails to do this, he agrees to pay interest upon the amount of interest which he has failed to discharge. The essence of the agreement is, that the borrower shall pay the interest punctually as stipulated. Now, if he does not pay, does he not withhold from the creditor his due, and is it unreasonable that interest should be paid, as in all other cases, where there is a failure to pay money when due.

But when the interest is due, the “hard-hearted” creditor demands the payment of it, and if not paid, he may resort

to legal coercion. Here the judicial shield might protect the creditor with a better grace, and with greater propriety, than against a contract to pay interest upon interest, made under more favorable circumstances. The fact is this judicial legislation, to get rid of express contracts, which are not made in violation of law, is wrong in principle.

The rapid accumulation of interest is another objection made to this mode of computation. This objection has no better foundation than the negligence of the borrower. He is not presumed to be punctual in paying the interest when due, and he must be protected in this indifference to his contract against his hard-hearted creditor. In other words, the creditor is more lenient than justice required, or the debtor had any right to expect; and for this lenity by the creditor, and indifference to his obligation by the debtor, he shall be the gainer, and the creditor the loser. Now this argument is as unsound in morals, as it is in logic. Such a principle might be established by an arbitrary legislative enactment, but it is not sustainable as judicial legislation.

The powerful mind of Lord Thurlow would not yield to such logic, but he was governed by the force of precedent. Precedents are not to be lightly regarded, but when they subvert contracts, and are founded in error, they should be abandoned. Prior to the reign of Henry VIII., usury, that is, the taking of interest, was deemed a crime, in the language of an attorney general of England, to be classed with murder and treason. In modern times, a usurious contract is only void in whole or in part, because it is made so by statute.

Where an individual agrees to pay the sum of one hundred dollars on a certain day, but fails to do it, can there be any difference whether that sum was due for property purchased, or for the use of money at a legal rate of interest? The consideration in the one case is as good as in the other, and interest on the failure of the debtor is recoverable in either case.

The case under consideration is stronger than where the payment of interest is regulated by the principal bond. The coupons were given for the different instalments of interest as they became due, and were made payable to bearer. On their face was expressed, that the amount was due for interest, &c. The coupons could have been made payable to bearer, for no other purpose than to give them currency. They passed as bank notes payable to bearer pass. The coupons acknowledged a sum to be due in each, and this brings them within the ninth section of the act of Michigan, above cited, which gives interest. It is notorious that the city was unable to pay the interest as it became due, and it could not have been collected by legal means. But now the city opposes the claim of interest on interest, under the precedents stated. These precedents are opposed by other decisions, and by every consideration of sound policy, of morals, of logic, and of law. A want of punctuality in the payment of their engagements, by public bodies, is injurious to the community at large. It introduces a loose morality, and works a pernicious effect upon society.

We think that these instalments of interest, made payable by these coupons being for a sum certain, were expressly within the ninth section, and that the interest is recoverable, from the time the city failed to pay it.

REED & MIX v. CLARK.

A printed statute may be corrected by the enrolled bill filed in the department of state.

A plea of the statute of limitations is not favored in law.

In the exercise of their discretion the court will not give leave to file this plea out of time, especially where there has been negligence and there is no pretence of merits.

Douglass appeared for plaintiffs.
for defendant.

OPINION OF THE COURT.

THIS action was brought on a judgment of the Supreme Court of New York, rendered in 1830. Several pleas were filed, and the cause now stands for trial. The defendant asks leave to plead the statute of limitations, and as an excuse for not having before filed this plea, he alleges that he was ignorant of the law, having been misled by the printed copy of the statutes. The law is alleged to have been erroneously copied from the original bill in the office of the secretary of state. This law was passed in 1820, and has been acted on by the courts up to this time.

The printed acts are declared to be the law of the land and are received as such, having been published by authority, and under the special superintendency of the secretary of state, by all the courts of the state. We do not suppose that this would prevent the courts, under all circumstances, from receiving the original enrolled bill to correct an error. But this point need not be decided, as there are other grounds on which the motion may be considered and decided.

It is not pretended that the defendant has a defence to

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the merits. He relies solely upon the technical plea of the statute. Although this is a legal defence it is not a conscientious one, and it is not favored in law. When pleaded in time, the defendant is entitled to the benefit of it; but when leave is asked to file such a plea out of time, the discretion of the court may be exercised, as the justice of the case may require.

On sufficient showing, the court will always permit a plea to be filed which may be essential to the merits of the case; but they will not give leave to file out of time a plea of the statute of limitations. This will always be refused where there has been negligence, especially where there is no pretence of a meritorious defence. Leave refused.

SACRIDER v. BROWN.

The clerk of a notary, strictly, is not authorised to present a bill for payment.

In London and Liverpool, under a long established usage, the clerk makes a demand.

The protest must be made by the notary.

If his name be used by the clerk, it is improper and cannot make the protest valid.

Hand for plaintiff.

Collens for defendant.

OPINION OF THE COURT.

THIS action is brought against the defendant as an indorser of a foreign bill of exchange; and the only question raised in the case is, whether the demand of payment and protest for non payment were legally made. The demand and protest were made by the clerk of the notary, using the name of the notary, but without his knowledge or direction.

In the case of *Lefly v. Mills*, 4 Term 175, Justice Buller said, "the next and the material part is the making of the demand: the party making the demand must have authority to receive the money," &c. It is material, too, to consider by whom the demand was made in this case; I am not satisfied that it was a proper demand, for it was only made by the banker's clerk. The demand of a foreign bill must be made by a notary public; to whom credit is given because he is a public officer."

Mr. Chitty, in his treatise on Bills, 333, states the above and adds: "but the number of bills requiring presentment is frequently so great as to render a presentment by the notary himself impossible, and the constant practice is, for the clerk to make the presentment." "In case there be not any public notary at the place where the bill is dishonored, it is expressly provided by 9 & 10 Will. 3, c. 17, s. 1, as to inland bills, that they may be protested for non payment by any substantial person at that place, in the presence of two or more witnesses."

The statement by Mr. Chitty that a demand of payment must be made by a notary and not by his clerk, caused a correspondence between him and the association of notaries for Liverpool, which afterwards included the notaries of London. From this it appeared that it had long been the practice in London and Liverpool, for the clerks of notaries to present bills for acceptance or payment. While Mr. Chitty admitted the practice, he still adhered to his original statement, and in page 465, when considering whether the clerk of a notary can, under the above statute, make the demand of payment, he says it is doubtful, though such is the practice. Again, Mr. Chitty says, page 477, "the established custom of merchants requires, that a formal demand of payment shall be made within the business hours of the last day of grace, by a notary, being a known public officer of experience, and sworn to do his duty," &c.

In a case in New York it has lately been decided that a notary's clerk cannot present a bill for payment, but that the presentment must be made by the notary. 3 Hill's Rep. 53 ; 4 Hill, 129.

Now if it were admitted that a notary's clerk may make a demand of payment, yet it is very clear that the clerk cannot make the protest. This must be done by the officer who acts under oath, and to whose official acts duly certified the law gives verity. The use of the name of the notary, without his consent or knowledge, was a gross impropriety and can add nothing to the protest. It was void when made, and time has not given it validity. We think the protest for non payment is not established by the evidence. Judgment for the defendants.

THE UNITED STATES v. DAVIS.

The surety of a postmaster is entitled to a discharge under the bankrupt law.

In England a general statute does not embrace the king, unless specially named.

And this doctrine has been adopted to a considerable extent in this country.

The statute of limitations does not bind the government, unless it be specially named.

In the post office act, government is bound to sue a surety of a postmaster, in two years after the defalcation, or it is barred.

A public defaulter is excluded from the benefit of the bankrupt law.

This is personal, because he has been unfaithful in his public duties.

But a surety is not excluded from the benefit of the act.

And being discharged, he may plead it in bar of a suit by the government.

Bates district attorney.

Emmons for defendant.

OPINION OF THE COURT.

THIS action is brought against the defendant as surety on the bond of a postmaster. The defendant pleaded a discharge under the bankrupt law. To this plea the plaintiffs demurred, joinder, &c. The question for decision is, whether the defendant as a surety to the government, is discharged under the bankrupt law.

It is a general principle in England, that the king is not bound by a general statutory provision. It must be made to apply to the sovereignty specially to bind it. The same principle has been recognised, to some extent at least, in this country. On this ground it has been uniformly held, that the statute of limitations does not bar a claim of the government, unless the provision be express that it shall be a bar. In the post office act, unless suit be brought against the surety of a postmaster, within two years after the defalcation occurs, the government is barred. In many other cases, the prosecution for certain penalties incurred is limited. But under the general statute, no court has held that the government was barred.

I have always considered this rule of doubtful policy, as against sureties, as it encourages negligence in public officers, and often proves ruinous to individuals. Reposing in the vigilance of the government, a surety of a postmaster, or other public agent, is not apprised of a defalcation, until it is too late to save himself. In these cases, it is especially necessary to apprise the surety of the defalcation at the earliest practicable moment, that he may take the proper steps for his indemnity. Suits have often been commenced from ten to twenty years after the failure of the principal.

The fourth section of the bankrupt law provides, "and such discharge and certificate when duly granted, shall, in

all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are proveable under this act, and shall and may be pleaded as a full and complete bar," &c.

In the first section of the act, it is declared not to extend to debts which shall have been created in consequence of a defalcation as a public officer, &c. And it is insisted that the debt now claimed did accrue by reason of the defalcation of the postmaster, and, consequently, is not within the act.

This argument is admitted as regards the postmaster, but does the act embrace his surety? The exception against a public defaulter is personal, and is intended to withhold from him a benefit given to others, because he is a defaulter. He has not discharged his duty faithfully to the public, and he is, therefore, excluded from a discharge for a debt thus incurred. But from this special provision, an inference may be drawn that, without such a provision, the law would have embraced the case of a defaulter.

As regards the surety, who is under no default, and is in no respect censurable for the responsibility incurred, we see no reason why he should not be discharged under the law, from such an indebtedment. He is literally within the act, and we see nothing in its policy which should exclude him from its benefits. The demurrer is overruled.

BRUSH & DURHAM v. ROBBINS.

At common law an amendment might be made whilst the proceedings were in paper.

A judgment of a previous term cannot be set aside on motion.

Amendments in England, under their statutes, constitute no rule for the courts in this country.

Mr. *Hand* for plaintiff.

Mr. *Emmons* for defendant.

OPINION OF THE COURT.

A MOTION is made to set aside a judgment between the above parties, rendered at October term, 1842. This is opposed, on the ground that a final judgment cannot be set aside on motion, after the expiration of the term at which it was entered.

At common law, whilst the proceedings are in paper, an amendment could be allowed, and a judgment could be set aside before the adjournment of the term at which it was entered: but, at a subsequent term, the court had no power to change the record of a previous term. T. Rayd. 38; 2 Strange, 1110. By various statutes in England and in this country, power is given to the courts to amend in many cases, which they could not exercise at common law.

In New York, the court set aside judgments entered at a previous term, for irregularity, on motion. There can be no doubt, that such a judgment may be set aside, if it be a mere nullity. But if it be a judgment on which an execution may issue, and the objection be an error of proceeding which an appellate court may correct, it cannot be set aside, after the term at which it was entered. In *Cameron*

v. *McRoberts*, 3 Wheat. 591, the court held, "that the circuit courts have no power to set aside their decrees in equity on motion, after the term at which they were rendered." A decree, in this respect, stands upon the same ground as a judgment.

A mistake in a clerical entry may be corrected at any time. But that which entered into the consideration of the court, and constitutes a part of the judgment, cannot be changed after the term.

The late decisions in England, under their statutes, constitute no rule for the action of courts in this country. Our statutes extend the power of amendment, in many respects, as far as the English statutes; but it has not been decided, under the acts of Congress, that the court may set aside a judgment of a previous term on motion. Such a power might be dangerous, and it does not appear to be necessary for the attainment of justice. The motion is overruled.

FELLOWS ET AL. v. HALL ET AL.

Where, during the pendency of a suit, one of the defendants is released under the bankrupt law, the suit as to him abates, and the assignee should be made a party.

But the bankruptcy should be pleaded.

The court are not bound to notice it on motion founded upon an affidavit.

The plaintiffs may show the invalidity of the decree of bankruptcy, through the fraud of the bankrupt.

And this can only be done on a plea or answer.

Where a decree *pro confesso* is taken before the expiration of the time given to the defendant to answer, it is irregular, and will be set aside on motion.

Mr. *Hand* for complainants.

Messrs. *Douglass* and *Walker* for defendants.

OPINION OF THE COURT.

THIS is a creditor's bill. It was filed the 20th of August, 1842. On the 10th of October ensuing, a decree *pro confesso* was entered against the defendant Hall, and, on the 10th of November following, a decree *pro confesso* was made against both of the defendants. A judgment at law was entered against Hall before this bill was filed; but prior to this Hall had filed his petition for the benefit of the bankrupt act, to wit, on the — day of July, 1842, and, on the 14th September ensuing, he was declared a bankrupt. On the 27th of December following, Hall was discharged.

A motion is now made to set aside all the proceedings, for irregularity, since the 14th of September.

It is insisted, that after the decree in bankruptcy against Hall, no step in the suit could be taken, until the assignee of Hall was made a party; that the decree of bankruptcy abated the suit.

In the 3d section of the bankrupt act, it is provided—
“And all suits in law or equity then pending (at the time of the decree of bankruptcy) in which such bankrupt is a party, may be prosecuted and defended by such assignee to their final conclusion, in the same way and with the same effect, as they might have been by such bankrupt.”
Where, as in this case, the law devolves the interest in controversy on an assignee, he should be made a party to the proceedings. If this be not done, it would be difficult to establish that the interests represented by the assignee are concluded by the decree. But, in this case, the bankruptcy should be brought before the court by a plea or answer. This not having been done, it is not clear that the court can consider the motion founded upon an affidavit merely. The plaintiffs have the right to show that the decree of bankruptcy was obtained through the fraud

of the petitioner, which would render it invalid. This cannot be done regularly on a motion. The point should be brought before the court by the pleadings.

But there are other irregularities for which the decree must be set aside.

The bill was filed the 22d of August, and the return day, by the 12th rule of the court, was the first Monday of October following, and the defendants had until the first Monday of November to plead, demur, or answer. No steps could be taken by the complainants until November; but they entered a decree *pro confesso* against the defendant Hall on the 10th of October, within ten days after the appearance day. This was in direct violation of rule 18th of this court. This proceeding was wholly irregular. Hall had no opportunity of being heard, as no time was given to him to answer. The default and decree *pro confesso* in November following were also irregular, as the former decree remained, which, of course, prevented the defendant from filing his answer.

The suit being still on the docket for further proceedings, the court order both decrees to be set aside, as having been irregularly entered, and leave is given to the defendant to plead or answer.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—DECEMBER TERM, 1844.

[This term was held by Judge LEAVITT—Judge McLEAN being in attendance at the Supreme Court at Washington.]

LESSEE OF GILLELAND v. MARTIN.

The court will not dismiss an action of ejectment when the lessor of the plaintiff is living, though he may be insane.

The wife is not a competent witness to prove that her husband is living, on such a motion.

Where an individual is proved to have been living within seven years, the burden of proving his death lies upon the party who asserts it.

The death of the lessor at the time of the demise laid in the declaration, when proved, will defeat the action.

If the lessor be a lunatic the action is well brought in his name.

Mr. Corry appeared for the plaintiff.

Mr. H. B. Curtis for the defendant.

OPINION OF JUDGE LEAVITT.

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At the last term, a motion was made by the defendant, to strike out the demise laid in the declaration, and to dismiss the suit, on the ground that the lessor of the plaintiff was dead at the time of its institution. This motion was based on the professional statement of counsel, setting forth, in substance, that in a conversation which he had with Mrs. Gilleland prior to the commencement of the suit, she asserted that her husband was not then living.

This motion having been continued to the present term, the plaintiff by his counsel now appears, and shows cause against it. And for this purpose he exhibits the affidavit

of Mrs. Gilleland, the wife of the lessor of the plaintiff, in which she states that her husband has been for many years past a lunatic, separated from his family, and at the time of the commencement of this suit resided in the city of Philadelphia. The affidavit of a Miss Wallace, the niece of Mrs. Gilleland, and residing with her, at Cincinnati, is also produced; in which she states that she has not seen Gilleland for several years, but has frequently heard of him, by letters from relatives of the family and other means of information, and that he was living in the city of Philadelphia, though laboring under insanity, and incapable of transacting business.

The affidavit of Mrs. Gilleland is objected to as incompetent to prove the fact for which it is offered. And it is clear that, as the wife of the plaintiff, she is inadmissible as a witness, and her statement is therefore rejected. But no such objection lies to the affidavit of Miss Wallace. And her statement, though not conclusive to prove the plaintiff to be in full life, is sufficient to raise the presumption of that fact, and to throw upon the defendant the *onus* of proving his death. The doctrine is: that where an individual is proved to have been living within seven years, the burden of proving his death lies upon the party who asserts it, Greenleaf's Ev. 47. For the purpose of this motion, the court is therefore justified, in the absence of proof to the contrary, in sustaining the presumption that the lessor of the plaintiff is in full life, and being a resident of the state of Pennsylvania, this court has jurisdiction of this suit.

That the death of the lessor of the plaintiff at the time of the demise laid in the declaration, when proved, will defeat a recovery in the action of ejectment, has been settled by the adjudications of this court, and is sustained by numerous authorities. 3 Hend. 149.

It is suggested by counsel that the fact of the lunacy of the plaintiff, which appears from the affidavits, creates a

James, Assignee, v. Wharton.

disability on his part to maintain this action. But there can be no doubt that the action is rightly brought in his name. It would not be sustained in the name of his committee, or of a guardian. Adams on Eject. 89. Shelford on Lunacy, 395, (Law Library.)

The motion is therefore overruled.

The counsel for the plaintiff having previously obtained leave to amend his declaration, and having filed an amended declaration, inserting a lot of ground in the town of Delaware by a number differing from that contained in the original, the defendant's counsel moved to set aside the amendment. And it was held, that this amendment was not allowable. A plaintiff has no right to amend his declaration by adding a count containing a demise from another person, and for a tract of land not before claimed. 1 Marsh. (Ky.) Rep. 450.

JAMES, ASSIGNEE, v. WHARTON.

Where the clerk is dead, who made the entries in a book of accounts, his hand writing may be proved.

But the original entries must be proved, and not a copy.

Mr. *James*, in person.

Mr. *Parrish* for defendant.

OPINION OF JUDGE LEAVITT.

THIS was an action of assumpsit, brought by the plaintiff as an assignee under the bankrupt law. On the trial, a book of accounts was produced; and the plaintiff proposed

to authenticate it as evidence to the jury, by proof that the entries which it contained were in the hand writing of a clerk, now a resident of another state. This evidence was objected to, as secondary in its character, and, therefore, inadmissible, unless the death of the clerk was first proved.

The doctrine is now well settled, that a book of accounts may be substantiated by proof of the hand writing of the clerk, who made the original entries, if he is dead, or without the jurisdiction of the court. The case of *Cram v. Spear*, 8 O. R. 494, is an authority in point. And recent elementary writers on the law of evidence sustain the position, that the fact of the death of the clerk is not material to the admissibility of this kind of evidence. Greenleaf's Ev. 143. This writer remarks, that "the value of the entry as evidence, lies in this, that it was cotemporaneous with the principal fact done, forming a link in the chain of events, and being part of the *res gestæ*." *Ib.* 144. But this principle does not apply to the book of accounts, now offered in evidence. This is not a book of original entries, but a mere transcript from that book, made by a clerk, who did not make those entries. The ground on which alone proof of the hand writing of the clerk gives validity to the book of accounts is, that it is the book of original entries; that the clerk is supposed to be cognisant of the transactions which it records; and, that the entries made by him, were made at or near the time they purport to have been made; and are, therefore, a part of the *res gestæ*. As a mere copy, made by a clerk who did not keep the original book, proof of his hand writing in no way conduces to establish the authenticity of the book offered in evidence; and it is, therefore, excluded from the consideration of the jury.

[The plaintiff introduced other evidence to prove his account, and obtained a verdict in his favor.]

Clarke, Assignee. v. Rist et al.

CLARKE, ASSIGNEE, v. RIST ET AL.

Where a judgment is fairly obtained against a defendant who has only equitable rights, and a creditor's bill is filed to subject those rights to the payment of the judgment, if the process issued on filing the bill be served before the defendant's petition is filed under the bankrupt law, the proceeding constitutes a lien under the bankrupt law.

In such a case, the court will not issue an injunction to restrain the parties from proceeding on the creditor's bill in the state court.

If fraud were alleged against the lien set up in the state court, that would be a ground on which the circuit court might take jurisdiction.

Mr. *Clarke* and Mr. *Coffin* appeared for the plaintiff.
Mr. *Moodey* and Mr. *James Mason* for the defendants.

OPINION OF JUDGE LEAVITT.

THIS bill is filed by the complainant, as the assignee in bankruptcy of Godfrey Beaumont. The facts before the court, so far as it is necessary to notice them, are—that in 1842, the bankrupt Beaumont was possessed of an equitable interest in certain valuable real estate, described in the bill; and in connection with his two sons, constituting the firm of J. Beaumont and Sons, was engaged in business, in the county of Columbiana, as a manufacturer of woollen goods; that in the early part of November, of that year, this firm, laboring under some embarrassments in their business, transferred by bill of sale, to one Springer, nearly all their personal property, to indemnify him for his suretyship to the Bank of New Lisbon, and Springer took possession of said property, the 1st of December, 1842; that at the November term, in said year, of the Court of Common Pleas of said Columbiana county, sundry judgments were obtained against the firm of Beaumont & Sons; on which executions severally issued the 2d of De-

ember, and were returned partially satisfied by a levy on personal property of the defendants; that shortly after, the plaintiffs in the several judgments recovered against said firm, filed bills in chancery in said court of common pleas, to subject the equitable interest of G. Beaumont in the real estate aforesaid, to the satisfaction of such judgments; and subpoenas duly issued, and were served in said cases, between the 3d and 7th of December.

It also appears, that the Beaumonts filed their several petitions for the benefit of the bankrupt law, the 15th of December, 1842, and were decreed bankrupts, and the complainant appointed their assignee, the 30th of January following; that soon after his appointment as assignee, the complainant was made a party to the proceedings in chancery, instituted by the judgment creditors, as aforesaid; and, as such appeared, and filed answers, denying the jurisdiction of the court, and insisting on the dismissal of the bills on that ground; that the Court of Common Pleas retained jurisdiction of said petitions in chancery, and upon hearing decreed the sale of Beaumont's equitable interest in the real estate aforesaid, and the distribution of the proceeds among the judgment creditors; but no sale has yet been effected.

It is also charged in the bill, that the counsel for the judgment creditors had notice of the assignment to Springer, and that Springer was in possession under it, previous to the institution of said proceedings in chancery.

The bill prays for an injunction, restraining the parties from further proceedings in the state court; and, that the liens of said judgment creditors may be set aside, and the property sold by the complainant, for the benefit of the general creditors of G. Beaumont.

The question arising on this state of facts, and which this court is called upon to decide is, whether the judgment creditors (the defendants in this case) by their judgments,

and the institution of the proceedings in chancery, to charge the equitable interest of the bankrupt as set forth in the bill, have acquired a lien on that interest, which is protected by the bankrupt law.

The last proviso of the second section of the act declares, "that nothing in this act contained shall be construed to annul, destroy or impair, any lawful rights of married women, or minors, or *any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the second and fifth sections of this act.*"

It is insisted on the part of the complainant, that the application of Beaumont for the benefit of the bankrupt law, suspended the jurisdiction of the state court in the chancery proceedings; and, that consequently, the decrees of that court in favor of the judgment creditors, for the sale of the equitable interest of Beaumont, in the real estate in question, were inoperative, and created no valid lien, in their behalf. On the other hand, it is contended, that as these judgments against Beaumont were obtained in the usual course of proceedings in the state courts, and without fraud or collusion between the parties, the court had full jurisdiction of the chancery proceedings, in their inception; that the subsequent application in bankruptcy by Beaumont, did not deprive that court of its power to proceed; and, that from the date of the subpoenas in the chancery cases, a lien existed in behalf of the judgment creditors, which this court will recognise and protect.

It will be seen from the provision of the bankrupt act, above quoted, that liens which are valid by the state laws, and are not opposed to, and in contravention of, the bankrupt law, are unimpaired by its operation.

The law of Ohio, under which the judgment creditors filed their bills, is intended to afford the means by which certain property and interests of a judgment debtor, may

be rendered available for the payment of his debts, which could not be reached by the ordinary process of execution. To charge the equitable interests of a judgment debtor in real estate, and subject those interests to the payment of a previously acquired judgment, is one of the most common cases, in which this statutory proceeding is resorted to. The creditor, on a proper case made, is entitled by the provision of the statute, to a decree for the sale of the equitable interest of the judgment debtor. The statute declares, that "the said courts shall decree sales, and enforce all necessary transfers and conveyances, to vest in any person purchasing, or taking under such decree, all the right, title, and interest of the said debtor, in the interest sold, or the subject of the decree, *at the time of the service of process in such case,*" &c. Swan's Stat. 704. From the language here used, it is undeniable that the lien of the judgment creditor is coeval with the date of the service of the subpoena in chancery. This, it is understood, is in accordance with the uniform construction of the law by the courts of Ohio, and the practice of those courts under it. The statute proceeds on the principle, that by the judgment at law the creditor acquires an inchoate right to the equitable interest of the judgment debtor; which, however, can only be perfected and made available, by a decree of sale by a court of chancery. But it is within the evident design of the statute, that from the time of the service of the process in the chancery proceeding, legal validity and force are given to this previously existing, but imperfect right.

Under a similar statute in New York, the same practice and the same principle of construction have obtained in the courts of that state. The case referred to in the argument of this case, decided by the district judge for the Northern District of New York, reported in the 5th volume of the Law Reporter, page 360, is very analogous in its facts to that now under consideration. In that case, cer-

tain creditors of a bankrupt, previously to the entry of a decree of bankruptcy, had filed their petitions in chancery, in a state court, under the statute of New York, to charge certain equitable interests of the bankrupt with the payment of their judgments. And the court held, that in the absence of any facts impeaching the original judgments as being fraudulent under the bankrupt law, the liens of the judgment creditors were protected; and an injunction to stay the proceedings of the parties in the state courts was refused.

The inquiry then arises, whether in the rendition of the several judgments in favor of the defendants in this bill, there was fraud, in fact or in law, vitiating not only those judgments, but also the subsequent proceedings in chancery, instituted to enforce the asserted liens, which are the subjects of controversy in this case.

By the second section of the bankrupt act, it is provided in substance, that all payments, securities, transfers, &c., in contemplation of bankruptcy, and for the purpose of any preference or priority to any creditor, &c., or to any person, not being a *bona fide* creditor, or purchaser for a valuable consideration, without notice, shall be deemed utterly void, &c. The settled and uniform construction given to this clause is, that it condemns and invalidates all transfers of property, or rights of property, made in view or contemplation of an application for relief under the law; or, when the person is in such a condition of embarrassment as amounts to a state of bankruptcy, under either of the circumstances here supposed, it is in direct contravention of the policy of the bankrupt law, that the bankrupt should make any changes or transfers of his property, whereby the rights of his general creditors may be injuriously affected.

Do the transactions between the bankrupt, Beaumont, and the defendants, fall within the prohibitions of this pro-

vision? In reference to the judgments obtained against the bankrupt, there is no allegation in the bill, that there was any actual fraud or collusion, in their entry or rendition. Nor is there any fact before the court from which, as a matter of necessary legal deduction, those judgments can be pronounced invalid. They were obtained in November, 1842, for debts contracted long before; and according to the usual course of proceedings in the state courts, either upon the issue and service of process, or by virtue of warrants of attorney previously executed for that purpose. The judgment creditors are not charged with a knowledge of the bankruptcy of the Beaumonts, at the time of the entry of these judgments; though the allegation is made, that their counsel was apprised of the bill of sale to Springer, before the commencement of the proceedings in chancery. But this does not infect the judgments with the taint of actual or constructive fraud. And no doubt can be entertained that, if Beaumont had then possessed the legal estate in the lands in controversy, the lien of the judgment creditors would have been effective and wholly unimpaired by subsequent application for relief under the bankrupt law. This position is fully sustained by the opinion of Judge M'Lean in the case of *M'Lean v. Rockey*, reported in the 7th No. of the 1st Vol. of the Western Law Journal. It is there said: "that a judgment constitutes a lien on real estate, which is recognised in the second section of the bankrupt law, is undisputed." And there is no allegation in the bill, that either in the causes of action, or in the prosecution of the above suits to judgment, there was fraud. The judgments therefore, having been rendered against the bankrupt, before his petition was filed, create a valid lien on his real estate.

Are the rights of these judgment creditors impaired by the fact that at the time the judgments were rendered, the bankrupt Beaumont had no legal interest in the property

in question on which a lien attached, under the statute of Ohio? The interest of Beaumont, as already stated, was merely an equitable interest. The proceedings under the statute, in the state court, to charge those interests, have been noticed. And it is to be observed, that these proceedings do not partake of the character of original suits. They are to be regarded in the light of incidents, or continuations of those suits. It would seem clear, from this view, assuming the judgments to be valid, that the state court had undoubted competency to entertain jurisdiction of the chancery proceedings, both before and after the application was filed by Beaumont for relief, under the bankrupt law. The lien of the judgment creditors, though not perfect on the rendition of the judgments, became so upon the service of the process in chancery, which was prior to the filing of the application in bankruptcy. These creditors then occupy the same position, and are entitled to the same rights, as if the bankrupt had possessed the legal estate, instead of an equitable interest, in the lands mentioned in the bill. Their liens are saved under the bankrupt law; and the state court having rightfully taken jurisdiction of the proceedings, designed to perfect those liens, may retain it, till the object sought for is consummated, in accordance with the statute.

It is regarded as indisputable, that there is no ground for the imputation of fraud, actual or constructive, in commencing and carrying forward the chancery proceedings in the state court. If fraud attaches to these, it must be because the conduct of the parties has given them this quality or characteristic. So far as the judgment creditors are concerned, there is clearly no room for any unfavorable inference. They stand before the court on the footing of persons, who, with no discreditable vigilance, have legitimately pursued their rights, under a statute sanctioning the procedure to which they resorted. Nor is there any better foundation for an impeachment of the conduct of the bankrupt. It

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was not by his procurement or agency, that the creditors commenced proceedings to enforce their equitable liens. In these transactions he was merely passive; and could not therefore have imparted to them the quality of fraud.

By these judgments, and the subsequent proceedings thereon in the state court, the defendants in the bill acquired a *bona fide* lien, prior to the filing of the petition in bankruptcy. The equitable interest of the bankrupt, in the property in question, did not therefore pass to, and rest in, his assignee; and no ground is presented for the exercise of the power of this court, in the withdrawal of those interests from the final disposition of the state court. The lien of the judgment creditors is saved, by the express terms of the bankrupt law; and this court has neither the right or the inclination to disturb it.

In the argument of the counsel for the complainant, the decision of this court in the case of M'Lean, assignee of Mahard, v. The Lafayette Bank and others, reported in the 1st No. of the 1st Vol. of the Western Law Journal, page 15, was referred to; and it was insisted, that the principles laid down by Judge M'Lean in the opinion delivered by him, vindicate the exercise of the jurisdiction of this court, in the case in which it is now invoked. But it will be observed, that the two cases differ in many essential features. In that decided by Judge M'Lean, there are various liens on the property of the bankrupt, by mortgages and judgments; some pending in a state court for adjudication; and in regard to all the liens, there was an express "allegation in the bill, that they were given in fraud of the bankrupt act." The judge, after reviewing the ample jurisdiction conferred on the federal courts by that act, in the settlement of all controversies growing out of bankruptcy, very justly concludes, "that where the foundation of the liens depends upon the construction of the bankrupt act, it would seem that the jurisdiction under which the law

was passed, should carry it into effect." The case was argued on a motion to dissolve the injunction, so far as the rights of one of the defendants was concerned; and on full consideration, the motion was refused, and the case continued for final hearing; but with the express declaration by the court, that the question of jurisdiction was not to be considered as finally decided.

In controversies, involving the proper construction of the bankrupt act, the validity of liens under it, and the adjustment of conflicting rights and priorities, there is great propriety in invoking the exercise of the jurisdiction of the federal courts. Their powers in these matters are more ample than those possessed by the state courts, and they can more satisfactorily act upon and adjust the rights of all the parties concerned. But when a state tribunal has rightfully taken jurisdiction of a case, though having some connection with an estate in bankruptcy, it affords no sufficient reason for its withdrawal from that jurisdiction, that a federal court might have taken cognisance of it. And it is proper, that the courts of the nation should cautiously abstain from the unnecessary exertion of powers, which may bring them into conflict with the state courts. Nothing can tend to the more serious disturbance of the harmonious action of the state and federal authorities, than these conflicts. And as far as practicable, consistently with the operation of the just powers of each, they are to be studiously avoided. The injunction prayed for is refused.

M'Lean, Assignee, v. The Lafayette Bank et al.

M'LEAN, Assignee, v. THE LAFAYETTE BANK ET AL.

Previous notice of a motion for the appointment of a receiver is not necessary, when counsel for the opposite party are present in court.

Where a bankrupt owned real estate incumbered by previous liens, which are before this court for adjustment, a receiver will be appointed on the application of the assignee in bankruptcy, although the bankrupt may have relinquished possession to some of the prior incumbrancers.

Messrs. *N. C. M'Lean, Wright, and Coffin & Miner* appeared for the complainant.

Mr. *Corry* for J. & M. Buckingham, and Mr. *Chase* for the Lafayette Bank.

OPINION OF THE COURT, BY JUDGE LEAVITT.

The complainant has submitted a motion for the appointment of a receiver, based on his affidavit, setting forth that J. Buckingham and Mark Buckingham, shortly after the decree in bankruptcy against Mahard, entered into the possession of, and have since occupied, without rightful authority, a farm described in the bill, formerly the property of the bankrupt; and that there is now a large amount of rent, in kind, upon the premises, the product of said farm, and under the control of said Buckinghams, who, as judgment creditors of said Mahard, are made defendants to the bill, and whose rights are, therefore, before the court for adjustment.

The counsel for the Buckinghams, and the counsel for the Lafayette Bank, appear, and resist the application for the appointment of a receiver. They set forth, in substance, in their statements, that the Buckinghams, having a lien on the said farm, by virtue of a judgment and levy upon it, as creditors of said Mahard, with the consent of the Lafayette

Bank, took possession, after it was abandoned by Mahard, and have since continued to occupy it. It is also stated, that said bank has the prior lien by mortgage upon said farm, and is content that the Buckinghams shall continue in the occupancy thereof, without the intervention of a receiver; they being, as it is alleged, men of substance, and able to respond to the parties interested for the rents and profits which have been or may be received by them.

It is insisted, in the first place, by counsel who oppose this motion, that it ought not to be granted, because previous notice has not been given to the parties interested, of an intention to submit it. The authorities referred to do not sustain the position, that this notice is necessary, under all circumstances. On the contrary, it appears that a court of chancery will sometimes appoint a receiver, on an *ex parte* application for that purpose; but ordinarily it will not do so until the time for the defendant's appearance has expired, and without an exhibition of facts rendering such summary proceeding necessary. 1 Barbour's Chan. Prac. 669. It is believed that no authorities can be produced, proving that notice of the motion is required, in any case, where the parties to be affected by the appointment of a receiver are in court, represented by counsel, who appear in resistance of the motion.

It seems to be supposed by counsel that the third rule, of the rules of practice for the courts of equity of the United States, adopted by the Supreme Court, and, consequently, obligatory on this court, requires a previous formal notice of the pending motion. This rule, however, obviously embraces only applications for "interlocutory orders, rules, and other proceedings," preparatory to the hearing of causes on their merits, made to a judge at chambers, or on rule days, at the clerk's office. It does not apply to a motion made in term, and in the presence of counsel.

This motion is also opposed on the ground that the case

pending, in which the motion is made, involves a question of jurisdiction between this court and one of the courts of the state; and that until this conflict of jurisdiction is finally settled, the power of this court to appoint a receiver cannot be rightfully exercised. In reply to this objection, Judge M'Lean, at the last term of this court, after full argument and mature consideration, refused, on a motion for that purpose, to dissolve the injunction granted in this case—maintaining that this court had jurisdiction, under the provisions of the late bankrupt law, both of the subject matter of, and the parties to, the pending suit. His opinion is reported in the 1st No. of the 1st Vol. of the Western Law Journal, page 15. After analysing and commenting on the 6th and 8th sections of the bankrupt act, he concludes, that “the jurisdiction vested in this court, under these sections, is complete, and reaches every possible controversy that can arise in the collection and distribution of the effects of the bankrupt.” And again, “the act of bankruptcy brings into the bankrupt court all the interests of the bankrupt; and it seems reasonable that the court should exercise an exclusive jurisdiction over those interests.” It is true, that in overruling the motion to dissolve the injunction, the Judge remarks, that the parties will not be precluded from the discussion of the question of jurisdiction on the final hearing. In this posture of this question, the court will not overrule the present motion, on the ground of a defect of jurisdiction.

These preliminary objections being disposed of, the question is presented, whether, from the facts before the court, it will be a rightful exercise of its power, to appoint a receiver, according to the prayer of the complainant.

The power to appoint a receiver pertains necessarily to every court having chancery jurisdiction. In the 1st Vol. of Barbour's Chancery Practice, page 658, it is said, “a receiver is a person appointed by the court, to receive the

rents and profits of land, or other property, or things in question in this court, pending the suit, where it does not appear reasonable that either party should do it." "The immediate moving cause of the appointment, is the preservation of the subject of litigation, or the rents and profits of it from waste, loss, or destruction." In Story's Equity, Vol. 2, page 158, it is laid down, that "the appointment of a receiver is a matter resting in the sound discretion of the court." The same principle is asserted in 1 Powell on Mort. note, 294; 1 Johns. Chan. Cas. 57. "It (the appointment of a receiver) may be granted, in any case of equitable property, upon suitable circumstances. 2 Story's Eq. 157, sect. 829.

What is the case before the court? A bill has been filed in this court by the complainant, as the assignee of Mahard, a bankrupt. It is averred in the bill, that Mahard, at the time of his bankruptcy, was possessed of a large real estate, incumbered by various mortgages and judgments, which he represents as having been procured in fraud of the bankrupt law, and, therefore, void; that proceedings had been instituted by some of the lien holders, in the Superior Court of Hamilton County, for the purpose of obtaining an adjudication upon their rights; and that in order to the final and satisfactory adjustment of the interests of all the creditors, it was necessary that the liens should be brought into this court, which, under the ample powers conferred on it by the bankrupt law, would possess complete jurisdiction to settle the rights of all concerned. The bill prays an injunction, restraining the mortgagees and judgment creditors from further proceeding in the state court to enforce their liens. The injunction was granted, and still continues in full force. The whole case is, therefore, before this court for a final hearing, and the equitable adjustment of all the interests involved in this controversy.

During the pendency of these proceedings, the Bucking-

hams have been in the occupancy of the farm in question, and are now in possession of a large amount of its products, the rightful ownership of which depends on the final decree and order of distribution to be made by this court. By the operation of the decree in bankruptcy against Mahard, all his interest in the premises, at the time of filing his application, was divested from him, and passed to and vested in his assignee. The assignee, therefore, stands in the position of legal owner of all the bankrupt's estate, and is also the legal representative of all his creditors. Ascertaining there were numerous and conflicting claims and liens on the large real estate of the bankrupt, and having reason to believe, as alleged in the bill, that some of these were fraudulent and void, as being in contravention of the bankrupt law, it was his duty to institute proceedings to test their validity, and to settle the priorities of such as should be adjudged valid. This court, in taking jurisdiction of the case, and enjoining further proceedings to enforce the liens, divested the holders of these liens of all right and power to interfere with the property to which the incumbrances attached, until the final hearing. Pending the suit in chancery, and while the injunction continued in force, none of the parties could rightfully exercise acts of ownership over the property in controversy. The Lafayette Bank, though represented as having a prior and undisputed lien on the farm, could not, in this posture of the case, without the sanction of this court, either take possession of the property, or give to another a valid assent to take possession. Neither did this right pertain to the Buckinghams, in virtue of their judgment and levy—especially, as that judgment is distinctly alleged to be void under the bankrupt law, and as it is one of the objects of the bill to procure the adjudication of this court on that point. The property of the bankrupt may be justly said to have been in the keeping of the law from the time of issuing the injunction, and the

rights of the lien holders in a state of suspension till the final hearing.

It would seem, that under these circumstances, the Buckinghams are not in the rightful possession of the farm in question; and it is equally clear that the case made, is one in which a court of chancery should exercise the power pertaining to it, of appointing a receiver. All the lien holders, as well as the general creditors of the bankrupt, Mahard, have an interest in the products of the farm, now under the control of the Buckinghams, and also in the rents and profits accruing, *pendente lite*; and there is great propriety in placing these in the keeping of a responsible officer of this court, to be held by him, subject to its final order. It is not perceived that this course can, by any possibility, injuriously affect the rights of any of the parties concerned. The assignee, as the representative of the general creditors, asserts that the appointment of a receiver is necessary. And, although the fact be conceded that the Buckinghams are now solvent, and will in all probability be able to respond hereafter to any claim that may be set up against them, growing out of their use and occupancy of the premises, yet, will it be proper to refer the numerous other creditors of the bankrupt to this troublesome, not to say doubtful, remedy, for the recovery of their rights? It is impossible to foresee what change may take place in the circumstances of the Buckinghams before the final adjudication of the rights of the parties concerned in this suit. If they should, in the intervening time, by any adverse fortune, become insolvent, the parties would be without any remedy. But, if no such change shall occur, it is altogether probable that, after the termination of this suit, should it be adverse to their claim, further litigation will be necessary to ascertain and enforce their liability; and, after the lapse it may be of years, such a proceeding would be attended with serious difficulties and embarrassments, and put the rights of other creditors in great jeopardy.

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The court, therefore, entertain no doubt that the case submitted calls for the exercise of its discretionary power in the appointment of a receiver; and the motion of the complainant is, accordingly, granted.

TORRANCE & DANIELS v. AMSDEN & CHAPMAN.

A court will set aside an award of arbitrators for misconduct, or where they have decided contrary to law.

Where, on the hearing, the defendants are surprised by evidence, and, from the unexpected absence of a witness, they are unable to explain the evidence—on this being shown, the arbitrators should have given time to produce the absent witness.

And having refused this, the testimony being important, it is ground for setting aside the award.

Mr. Parrish and *Mr. Beecher* appeared for the plaintiffs.
Mr. Boalt and *Mr. Wright* for the defendants.

OPINION OF JUDGE LEAVITT.

AFTER the institution of this suit, and before the trial term, the parties by their written submission, dated the 3d of May, 1844, agreed to refer the matters in controversy to arbitrators, who were to meet within ninety days from the date of the agreement, on ten days previous notice by either party, and were authorised “to hear all the proofs and allegations of the parties, in relation to the matters in difference, and determine the same as shall be legal and just.” It was also agreed, that the award, having been made in writing, should be filed by the successful party, who was authorised to make it a rule of this court, and to cause judgment to be entered thereon, for the amount of damages and costs adjudged to be paid. The arbitrators met in pur-

suance of this agreement; and, by their award, dated the 20th of July last, report that there is due from the defendants to the plaintiffs, the sum of seven hundred and four dollars and ninety-one cents.

The award was filed in this court, on the first day of the present term, accompanied with a notice of a motion for a judgment thereon. And on the same day, the defendants filed their motion for a rule to show cause, why said award should not be set aside.

In support of the motion to set aside the award, it is insisted, that the defendants were deprived of an opportunity to present all their testimony at the hearing, by reason of the unexpected absence of an important witness, who was prevented by sickness from attending; and that the arbitrators unreasonably refused to adjourn or postpone the hearing, for the purpose of enabling the defendants to procure the testimony of this witness. It is also insisted, that the defendants were surprised at the hearing, by the unexpected character of the testimony of the witness, Hitchcock; which testimony, it is alleged, the defendants are able to contradict and disprove.

Several affidavits have been read, to sustain these allegations, and to make it appear that great injustice has been done to the defendants, by the award of the arbitrators.

To understand fully the matters in controversy between these parties, and the bearings of the affidavits, on the points presented for the decision of the court, it will be necessary to refer briefly to the nature of the claim set up by the plaintiffs, and which it was the object of the present suit to enforce.

The facts are substantially as follows: The plaintiffs, being citizens of the state of New York, engaged in the business of manufacturing flour, made advances in money, to the defendants, who are commission merchants in the state of Ohio, for the purchase of wheat, with an express

stipulation, embodied in the receipts given for the cash so advanced, that the wheat was to be purchased at specified prices. It appears, that some time after these advances were made, there was a considerable advance in the price of wheat, and that the defendants continued to make purchases at these prices, though above the prices stipulated in the receipts; and, that the wheat so purchased was forwarded to, and received by the plaintiffs, who credited the defendants therewith, at the rates mentioned in the receipts, and not at the rates actually paid by them. And by this mode of crediting the wheat, a considerable balance was found due to the plaintiffs. It was claimed by the defendants, that one Hitchcock, who was a general agent for the plaintiffs in the purchase and shipment of wheat, was fully apprised that the defendants were purchasing at the advanced prices, and that he recognised and ratified these purchases.

It will be apparent from the foregoing statement, that the important question to be decided by the arbitrators was, whether the agent of the plaintiffs had authorised or assented to the purchases made by the defendants, at prices beyond those stipulated in the receipts. Such authority or assent, on the part of their agent, would be obligatory on the plaintiffs, and would entitle the defendants to a credit at the rates at which the purchases were made. And, on the other hand, without such authority or assent, the plaintiffs could rightfully insist, that the defendants were concluded by the prices specified in the receipts they executed.

Do the facts exhibited in the affidavits in support of the motion to set aside the award, prove, that owing to any improper conduct on the part of the arbitrators, the defendants have been prevented from a full investigation of the important fact in issue between the parties, and that injustice has been done to the defendants by the award?

It does not satisfactorily appear from the written submis-

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sion of the parties, whether they intended this reference as at common law, or under the statute of Ohio. It may perhaps be regarded in either aspect. The statute regulating arbitrations does not take away the common law right of parties to arbitrate their controversies. Wright's Rep. 37. It is clear, however, that it was competent for the parties to refer the matters in controversy between them to arbitrators, under the statute. The right of statutory reference is not confined to cases in which no suit is pending. The first section of the statute secures to "all persons who shall have *any* controversy, or controversies, except when the possession or title of real estate may come in question," the right of reference to arbitrators. It is equally clear that parties litigant in this court, in any case in which the court has jurisdiction, have the same right to refer their controversies, as if the case was pending in a state court.

For the present, this will be considered as a proceeding under the statute of Ohio. By the eleventh section of that statute, courts are authorised to set aside any award made under it, if it appear that it has been obtained by fraud, corruption, or undue means; or "that the arbitrators have misbehaved."

There is no pretence in the present case, that the award was the result of fraud, corruption, or any undue means. And viewed as a statutory reference, it cannot be set aside, unless the arbitrators have been guilty of some misbehaviour. The statute does not define what shall constitute such misbehaviour on the part of the arbitrators, as will be sufficient to invalidate their award; but it is clear the award may be liable to objection on this ground, in a case involving no moral turpitude, or wilful misconduct on the part of the arbitrators. If, while acting in perfect good faith, they have mistaken or misapprehended their duty, and injury or injustice have resulted therefrom to either of the parties,

it is competent for the court to which the award is returned, to remedy the evil by setting it aside, and opening the controversy for a rehearing.

The exception taken to the conduct of the arbitrators in this case, is founded mainly on the allegation, that they unreasonably refused to postpone the hearing, under circumstances in which it is insisted it was plainly their duty to have done so. And if this allegation is sustained, it affords a sufficient ground for the interposition of this court, in the manner sought for by the defendants.

The facts disclosed in the affidavits bearing on this point, will be briefly noticed.

The defendant Amsden, in his affidavit, states that he considered Charles P. Davis as a material witness on the trial, and that, previous to the trial, he had obtained from him a promise to attend. He also states, that when the arbitrators and parties met, and before the hearing commenced, he made known the fact to the arbitrators, that Davis was an important witness for him, and that he had reason to expect his attendance before the termination of the trial; and with that expectation, he consented that the hearing should commence in the absence of the expected witness. It appears from the affidavits of others, that when the trial had proceeded for about an hour, the defendant Amsden received the information, by a person who then arrived at the place of trial, that the absent witness would not be able to attend, on account of sickness. And a motion was immediately made for the adjournment of the trial, on the ground of the unavoidable absence of the witness Davis; but the arbitrators overruled this motion, decided that the trial should then proceed, and made up their award, without giving the defendant an opportunity of introducing Davis as a witness.

The affidavit of Davis is before the court. He corroborates the statement of Amsden, as to his previous promise

to attend the trial, and says it was his purpose to attend, and that sickness alone prevented him from doing so.

Davis also sets forth in his affidavit, that during the time the defendants were purchasing wheat for the plaintiffs, he was clerk for Chapman & Harkness, and that they purchased wheat for Hitchcock as the agent of plaintiffs, with funds received from the defendants, for which the agent allowed Chapman & Harkness the highest market price, and very considerably above the prices stipulated in the receipts, given by the defendants to the plaintiffs.

The facts to which Davis would have testified, if present at the trial, show clearly that he was properly regarded as a material witness for the defendants, and that his testimony might have produced a result different from that to which the arbitrators arrived: for it is impossible to resist the conclusion, that the evidence of Hitchcock to the effect that he had not authorised the defendants to pay the advanced prices for wheat, and had not given his assent to the purchases made at such prices, had a controlling influence on the minds of the arbitrators, in making their award. And any testimony contradictory of that given by Hitchcock, on this material point in the controversy between these parties, could not be otherwise than important to the defendants. Though it may not have been sufficient, in the judgment of the arbitrators, to overthrow and set aside the statement of Hitchcock, yet if it would have conduced to that result, it was the right of the defendants to have the benefit of it; and that they were deprived of it, after the use of reasonable diligence to obtain it, and without any default on their part, affords a just ground of complaint.

That the arbitrators possessed the power to adjourn from time to time, as they should deem necessary to the investigation of the merits of the controversy between these parties, cannot be disputed. And it was a matter of obvious

justice and propriety to exercise this power, if, from any cause not attributable to negligence, either party was prevented, at the time set for the hearing, from producing material testimony.

So far as any authorities have been found, bearing upon this point, they sustain the position, that the refusal of the arbitrators to grant a postponement in this case is a good ground for setting aside their award, and opening the case for another investigation. In Vol. 1st, Am. Com. Law, page 470, an abstract is given of the case of *Coryell v. Coryell*, reported in Coxe's N. J. Rep. 385, in which the court say, "if the arbitrators refuse a request for an adjournment, founded on sufficient reasons, and offered at a proper season, it is a good ground for vacating an award."

It is also urged, as a ground for setting aside the award, that the defendants were surprised at the hearing, by evidence which they could not reasonably anticipate, and which they were not prepared to rebut.

It may be questioned whether, viewing this as a mere statutory reference, the award is open to any exceptions, not specified in the statute. But as the allegation of surprise at the trial is closely connected with the refusal of the arbitrators to grant an adjournment, it will not be improper to notice it.

It is laid down in the books, that awards are put upon the same footing as verdicts at law; and the reasons which will induce a court to grant a new trial, will prevail on an application to set aside an award. 1 Am. Com. Law, 464; and the authorities there cited. And in Tidd's Prac. (New Ed.) 841, the doctrine is asserted as applicable to the English courts, that on an affidavit that the party has procured new evidence since the reference, and that there was some surprise at the hearing, against which he could not be required to guard, a new hearing will be granted.

Do the facts disclosed in the affidavits bring this case within these principles?

The defendant Amsden states in his affidavit, he was not aware, till the trial, that Hitchcock would deny the authority given to purchase wheat at the advanced market prices, and was, therefore, not prepared to prove this fact. He also states that he has been informed since the trial, that he can prove the admissions of Hitchcock, that such authority was given, but was not aware of this testimony before or at the trial. And the affidavits of several witnesses are produced, from whose statements the implication is strong, that the agent Hitchcock was apprised of the prices paid by the defendants for wheat, and gave his sanction to the purchases.

For the purposes of this motion, the facts stated in the affidavits being uncontradicted, are to be taken as true. Amsden asserts positively, that he was authorised by Hitchcock to give the increasing market prices for wheat. He prepared for the trial, under a belief that the agent of the plaintiffs would not deny this fact. His denial, therefore, was a surprise upon him; against which he could not, under the circumstances of the case, be expected to guard; and which, in the judgment of the court, affords an additional reason for giving to these parties another opportunity to investigate the matters in controversy between them.

Courts reluctantly interfere to set aside the verdict of triers, appointed by parties to settle their disputes. They will not do so from the mere fact that these triers have arrived at a different result from that to which the court would have been conducted from the evidence adduced; nor will they ordinarily disturb an award, on the ground that the arbitrators have mistaken the law; but where, in a proper case made, they have refused a postponement; or a party has been surprised, without any default on his side, by unexpected evidence at the hearing; so that the facts of the case have not been fully presented to the arbitrators, and a reasonable ground of suspicion is afforded that

ample justice has not been done, it is a matter of the most obvious propriety, to give an opportunity for a re-trial.

In the present case, less repugnance is felt to setting aside this award, from the consideration of the fact, that if the plaintiffs' demand is a just and equitable one, it will not be hazarded by this course, as they will have the amplest opportunity of reasserting and establishing it, on a second trial. On the other hand, if judgment is now entered on the award, the defendants will be forever concluded thereby; and if founded on injustice, the law affords no remedy, as the case cannot be taken by appeal or writ of error to any other tribunal, for trial or revision.

The award is, therefore, set aside. And the defendants adjudged to pay the costs of the arbitration.

SLACOM v. WISHART.

Fraud may be set up as a defence by the maker against the payee of a note.

The same defence may be made against an assignee who had notice of the fraud before the assignment.

Or it may be set up by an assignee after the note was due, or if assigned without consideration.

But against a *bona fide* assignee, for a valuable consideration, before the note was due, such a defence cannot be made.

Mr. *Starr* appeared for the plaintiff.

Messrs. *Spalding* and *Chase* for the defendant.

OPINION OF JUDGE LEAVITT.

THIS suit was brought by the plaintiff as the indorsee of two promissory notes, each for the sum of \$666.66, dated the 23d of August, 1838, drawn by the defendant, payable

to the order of Joseph H. Benham, at the Franklin Bank of Cincinnati; one, due in twelve—the other, in eighteen months from date.

The defendant set up, as a defence to the action, that these notes were obtained by fraud, and without consideration; and that they were transferred to the plaintiff after maturity, and, therefore, in a suit in his name, are subject to the same exceptions, and open to the same defence, as if sued in the name of the payee.

The material facts proved were as follows: In the early part of August, 1838, Benham, the payee of the notes, then being the editor and publisher of a newspaper at Cincinnati, called the Kentucky and Ohio Journal, wrote to the defendant, residing at St. Clairsville, in this state, expressing his desire to sell the paper, and advising the defendant to purchase it, for his son, a printer. In this letter, Benham gave a very favorable account of the condition and prospects of the paper, representing, among other things, that there were then about fourteen hundred paying subscribers in the county, besides several hundred in the city; and, assuring him, that five hundred subscribers could be at once obtained, in the city, to a daily paper; and, that the concern could be made worth eight or ten thousand dollars per annum.

Soon after the receipt of this letter, the defendant visited Cincinnati; and, after examining the office-book, subscription list, &c., purchased one half of the paper, at two thousand dollars, and executed the two notes above described, together with another, not now in controversy. The notes were drawn in the usual form of joint and several notes, commencing, *we or either of us promise*, &c.; and it was the intention of the parties that the name of the defendant's son should be added, but they were never executed by him.

It is proved, by Mr. Fisher, a witness for the defendant,

that, a few days after the above sale, he purchased from Benham the other half of the concern, at one thousand dollars. This witness states, that he was induced to make this purchase by the flattering representations of Benham as to the patronage and prospects of the paper; that he soon became satisfied these representations were false and deceptive; that, in fact, the entire subscription list, including exchanges, did not exceed twelve hundred names; that the paper was unpopular, and subscribers were constantly ordering discontinuances, while many, to whom the papers were sent, refused to take them from the post-offices. This witness gives it as his opinion, that the whole number of paying subscribers did not exceed four hundred; that to one acquainted with the true condition of the paper, it could not have been sold for five hundred dollars; and that its patronage did not justify the continuance of its publication. He published it for a few weeks, when it was discontinued, and united with and merged in another paper. He also states, that it was impossible, at the time of the defendant's purchase, by any investigation, to ascertain the real state of the paper.

The witness also states, that neither the defendant, or his son, took possession of the concern, or in any way exercised any acts of ownership or control over it; and that the contract for its purchase was abandoned a few days after the date of the notes.

To repel the inference of fraud, from the foregoing facts, the plaintiff introduced Mr. Flinn as a witness, who testified that, at the time of the sale to the defendant, he was in the employment of Benham, as a clerk in the newspaper office; that he gave the defendant all the aid in his power, in examining the books and subscription list; that Benham was not a practical printer, and referred the defendant to persons employed in the office for information concerning the paper. This witness also says, he considered the sub-

scription list a good one; but that, in his opinion, Benham had lost money by the publication of the paper.

It appears that Benham died in the summer of 1839. It is in proof, that the plaintiff is the brother of Mrs. Benham, and is now, and has been for eight or ten years, the consul of the United States, at Rio Janeiro. There is no evidence that he has been in the United States since the date of the notes; or that he ever saw the notes, or paid any consideration for them.

It does not appear from the evidence at what time they were endorsed by Benham. Doctor Lukin, whose deposition has been read, says, that in the year 1839, and shortly prior to Benham's death, he had some conversation with him in relation to these notes. This was after one of the notes had become due.

Upon the law applicable to the case, the court charged the jury as follows:

It is a well settled principle, that in a suit by the payee against the maker of a promissory note, the latter may set up, as a legal ground for refusing payment, that it had its inception in fraud; or, that there has been a total failure of the consideration for which the note was given. It is equally well settled, that where a negotiable note is indorsed, before it become due, either in payment of a pre-existing debt, or for a good consideration paid, without notice of any fraud in its origin or execution, the indorsee is regarded as an innocent holder; and, as against him, the maker cannot set up fraud, as a defence. This doctrine has been long established by the adjudication of the courts in this country and in England, and is based upon the hypothesis, that the interests of a commercial community require that every possible facility should be afforded to the free and unobstructed circulation of negotiable paper.

But, if a note is negotiated after maturity, the indorsee receives it subject to all the rights and equities existing be-

tween the payee and the maker, before the indorsement. The fact that the note is overdue, and thus dishonored by non payment, is sufficient to put the indorsee on his guard; and if he takes it, he does so at his peril. He occupies the same position as the payee; and any defence that the maker could assert as against the payee, may be set up against the indorsee.

The first important inquiry arising in this case is, whether a fraud was practised upon the defendant by Benham, in the sale of the newspaper to the defendant. It is insisted by the counsel for the defendant, that Benham's letter, in connection with the testimony of the witness Fisher, clearly establishes the fraudulent conduct of Benham in this transaction. On this point, it will be sufficient to remark, that if the evidence satisfies the jury there was a wilful suppression, or a false statement, of any material facts, in reference to the actual condition or future prospects of the printing establishment, calculated to mislead and deceive the defendant, and which influenced his mind in making the purchase and giving the notes in question, Benham was guilty of a fraud. It is contended on the part of the plaintiff, that the testimony of the witness Flinn repels the presumption of any fraudulent design on the part of Benham, and shows that the defendant did not only rely on the statements and representations contained in Benham's letter; but, after a personal examination of the office, and from information derived from other sources, entered into the contract, and executed the notes.

Applying the law, as stated by the court, it will be for the jury to decide, whether the imputation of fraud rests upon the conduct of Benham.

If the jury shall be led to the conclusion, that the evidence merely establishes the fact, that, in agreeing to pay two thousand dollars for an interest of one half in the newspaper, the defendant unwisely and inconsiderately gave his

assent to a hard bargain, this will not be sufficient to impeach these notes. That the owner of property has insisted upon, and the buyer has agreed to give, an exorbitant price for it, will not, in the absence of fraud or unfair dealing, vitiate the contract. It is true, an entire failure of the consideration for which a note is given, is a legal bar to a recovery upon it; but a failure in part only of the consideration, will not protect the maker from liability.

If the jury shall believe the transaction to be infected with fraud, another important inquiry will present itself for their consideration, namely, were these notes indorsed to the plaintiff, in the usual course of business, and before they arrived at maturity. If thus indorsed, in accordance with the law already stated, the plaintiff is an innocent holder, and is not chargeable with the consequences of any fraud attaching to them in their inception.

The absence of the plaintiff from the United States, and the want of testimony on his part, proving any business transactions between him and Benham, are urged by the counsel for the defendant, as sustaining the presumption that the notes were not transferred in the usual course of business. And the testimony of Dr. Lukin, it is insisted, is sufficient to conduct the jury to the conclusion, that the notes were over due when indorsed by Benham; at least, that they were in his possession and under his control, till after they arrived at maturity. If the jury shall think this conclusion warranted by the evidence, they may properly presume the plaintiff received the notes on the credit of the indorser; and if so, he stands in the situation of the payee. And any defence which could be set up in an action against the payee is available in a suit by the indorsee.

[The jury returned a verdict for the defendant.]

AT CHAMBERS—APRIL, 1845.

BROOKS & MORRIS v. STOLLEY.

The Circuit Court of the United States has no jurisdiction to enforce the specific execution of a contract for the use of a patent right, where the parties live in the state where suit is brought: but they may, by injunction, protect the right of the patentee or his assignee from infringement.

If a license to use a patented machine be conditional, the conditions must be performed, or there can be no right to the use.

The use of the machine, under such circumstances, is an infringement, and may be enjoined.

There is no pretence of right, under the license, in such a case, and the question must be considered as though no license had been granted.

When a license to use a patented planing machine was granted, on rendering a weekly account of the boards planed, and paying on each thousand feet planed one dollar and twenty-five cents, and other conditions, the payment must be made weekly, &c., to authorise the use. Any alleged failure by the patentee or his assignee, under the contract of license, will not authorise the use, unless the defendant has done every thing in his power to perform the contract. In such a case there is no adequate remedy at law.

As the defendant justifies under the license, he must show the performance of the conditions of the grant.

A party claiming a right under a contract, must take it as agreed to by the parties.

Equity will direct the cancelment of a contract for fraud or mistake, but it cannot alter the contract.

Jurisdiction being acquired, on the ground of infringement, the court may settle other matters between the parties in the case, which do not afford original ground of jurisdiction.

The defendant will be enjoined except on the terms of the license.

Under the circumstances, the failure of the defendant cannot be considered as an abandonment of the license.

Messrs. Wright & Coffin for the complainants.

Mr. Walker for the defendant.

OPINION OF JUDGE M'LEAN.

THIS is an application at Chambers for an injunction to restrain the defendant from using a certain planing machine, claimed by the complainants under Woodworth's patent. In their bill, the complainants set out the obtainment of the

original patent by Woodworth, and the renewal of it by his administrator, the 16th November, 1842, all of which proceedings are alleged to be formal and valid: and they further state that they are the assignees of the patent for Hamilton county, Ohio, and other territory, as specified in the assignment; that in the above county, they have had for a long time the machine in operation, and that the defendant, having full knowledge of this, applied for a license to run said machine in Hamilton county, which was granted by the complainants, agreeably to the terms of a sealed contract, dated the 11th of September, 1843; that, by the contract, defendant bound himself to pay to the complainants one dollar and twenty-five cents for every thousand feet of boards he should plane, to be paid on Monday of every week, and that he should render an account, if required, under oath, and also should keep books, to which the complainants should have access, and in which the boards planed should be entered; that the defendant should require payment in cash before the boards planed, except those planed for himself, should be taken out of his possession; that, for a short time, the defendant complied with the contract by making payment, &c., but for some time past he has utterly refused to make the stipulated payments to the complainants, and in other respects has refused to be governed by the contract, although he still continues to run the machine; and on this ground an injunction is prayed, &c.

The defendant admits the obtainment, renewal and assignment of the patent, as stated by the complainants; but he denies the validity of the renewed patent. He denies that he has refused to render an account of the plank planed, or that he has rendered a false account. His books, he alleges, have always been accessible to the complainants, but he admits the failure to make payment, and he avers that the complainants have, in several respects, violated

the contract on their part; that he was deceived as to the import of certain parts of the contract, &c., and he insists that the complainants have ample remedy at law, &c. The application is made on the bill and contract referred to; and on these it must be considered, in connection with the answer.

In the argument, an objection is made to the jurisdiction; and this will be first examined.

It is suggested, that, as the whole controversy in the case arises under the contract of license, the parties to which being citizens of this state, the federal court cannot take jurisdiction. This objection would be unanswerable, if no right were involved in the controversy, except what arises out of the contract: as, for instance, the circuit court could take no jurisdiction under the contract, of an action, merely to recover the sums agreed to be paid by the defendant; but, in the present aspect of the case, it is not limited to the contract. The complainants set up their right under the patent, and allege that the defendant is infringing that right; that the license affords no justification whatever to the defendant. The right then of the complainants to an injunction, is not founded by them on the contract, but on the assignment of the patent. If the object of the bill were merely to enforce a specific execution of the contract, the Circuit Court of the United States could exercise no jurisdiction in the case.

It must be admitted that the contract constitutes an important part of the case. Except on the ground that the patent is invalid, under which the complainants claim, there is no pretence of right by the defendant to use the machine, unless he derives it from the contract. In this view, the contract must be considered as a license to the defendant, and its terms must be construed.

As the validity of Woodworth's patent, and the assignment to complainants, as far as regards the right to an injunction, has been heretofore considered and decided, on

this motion that question will not be examined. It may not be improper, however, to suggest, whether the defendant, having acknowledged the validity of the complainants' right, under his hand and seal, is not estopped now from denying it. If in this admission he was misled, and on that ground contends that he is not bound by it, he must repudiate the contract, and claim nothing under it. He cannot claim that part of the contract which may be favorable to his interests, and reject that which operates against him.

The defendant admits that he has failed to make payment, which is the important fact of the agreement, as it constituted the only motive which the complainants could have had to enter into the agreement. But as the weekly payments may be enforced at law, it is contended that the remedy is at law, and not in equity. Whatever right the defendant can have to run the machine, arises under the contract; and the payment of the consideration is the foundation of that right. Can he claim a benefit under a contract which he has refused to perform?

The defendant by the agreement was to use the machine, in the language of the writing, "on conditions hereinafter mentioned." The weekly payments, planing for cash only, no credit, &c., &c., being stated, the contract proceeds: "now in consideration of the propositions aforesaid, to wit, that the said John Stolley shall pay said Brooks & Morris one dollar and twenty-five cents for each and every thousand feet of boards he may plane, payable on Monday of every week, &c., and shall do the other things stipulated, the said Brooks & Morris license said Stolley the right of running either of his two machines, provided he does not run both at the same time, &c., and provided also he shall keep and perform on his part all the stipulations aforesaid."

Now the terms of the contract make the performance of its stipulations by the defendant a condition to his continued use of the machine; and if the words of the contract did not import, and indeed clearly sustain this view, equi-

table considerations, arising from the nature of the contract, would require such a construction of it. The payment is to be made weekly. Could any reasonable construction of the contract give the right to run the machine by the defendant, in default of such payment? The frequent settlement and payments show that longer indulgence was not intended by the parties, and that a remedy at law would be no adequate relief to the complainants. To enforce the payments by legal means, would require a weekly suit; and this would subject the complainants to inconvenience, delay and expense, which would nearly, if not quite, be equal to the amount recovered. Such a construction of the agreement would be as inequitable as the remedy proposed would be inadequate.

If the defendant claims any right under the contract, he must show that he has done every thing on his part, which in equity he can be required to do, to entitle him to the right asserted. He has a license to use the machine on certain conditions; but it does not follow that he may use it without conditions. The alleged violation of the contract by the complainants, does not help the equity of the defendant. He asks a specific execution of the contract, for he justifies under it. Can he do this on the ground that the complainants have given a license to others to use Woodworth's patent, in violation of the agreement? In admitting his failure to make the weekly payments, he, in effect, admits that he has done nothing to entitle him to the use of the machine.

The complainants, in the close of the contract, reserve the right, under certain circumstances, to give other licenses. This the defendant avers was not understood by him, and that he was overreached by it. If the defendant be dissatisfied with the contract, he has only to abandon it. He is under no obligation to run the machine. But if he do run it, he must conform to the conditions on which the right to do so was granted.

The complainants invoke the aid of equity, not to decree a specific execution of the contract, but to protect their rights as assignees of the patent. This right they allege has been infringed. The defendant relies on the license contained in the contract; but, having failed to make the weekly payments, he has no pretence of right to run the machine. To entitle himself to the benefit of the license, it is incumbent on the defendant to do all which he is bound to do; and then, if he fail in the strict performance, by reason of the act of the complainants, he will be equally entitled to the use of the machine, as if he had literally and fully performed his part of the contract—as if he had tendered the weekly payments, having kept a regular account, and the complainants refused to receive the money, the defendant's right could not be questioned. But he has failed either to make or tender these payments. He, therefore, can have no standing or claim in law or equity, either to the use of the machine or to damages from the complainants.

A question is made whether the failure of the defendant to make the weekly payments operates as a forfeiture of the contract. There is no condition of forfeiture in the contract. Whether it has been abandoned by the defendant must depend upon the circumstances of the case. A court of chancery will not decree the cancelment of a contract, except for fraud or mistake. In this case, the party who has violated the contract, and complains of its unfairness, claims the benefit of it. A court of equity, as well as a court of law, must act upon a contract as it is; or, for sufficient reasons, chancery will direct it to be delivered up and canceled.

The right claimed by the complainants is an equitable right, which is protected by the exercise of the extraordinary jurisdiction of a court of chancery: and in this view, it is of no importance whether the alleged violation is under the

pretence of a license or not. If the defendant have no license to use the machine, as he is now using it, he is without right or excuse.

An injunction is prayed, which, in effect, will annul the contract. Now, although it may be admitted that the defendant, as the facts of the case stand, could not successfully invoke in his behalf the action of a court of equity or of law, yet, under the relief asked by the complainants, a somewhat different view may be taken. Are the complainants entitled to an absolute injunction, which shall annihilate the contract? It appears to me, that short of this, adequate relief may be given. In this respect the case is altogether different from an ordinary case of infringement, where no contract has been made by the parties. In that case an absolute injunction is the only adequate relief; but, in the case under consideration, the complainants have licensed the defendant to use the patented right on certain conditions. If the use go beyond these conditions, there is an infringement, which must stand upon the general ground, unaffected by the contract; and as to such an use, the injunction should be absolute. On this ground the jurisdiction in this case is sustainable; and, having jurisdiction, the court may decide other matters between the parties, which, of themselves, might not afford ground for the original exercise of jurisdiction.

Upon the whole, I will allow the writ prayed for, to enjoin the defendant from the use of the planing machine described in the bill, unless he shall pay, or offer to pay, to the complainants, one dollar and twenty-five cents for each and every thousand feet of boards he may have planed, the preceding week, every Monday, during the unexpired term of the patent; and unless he shall keep a regular account of the planing done, and permit the complainants to have access to the books, and unless the defendant shall also do the other things, which, by the contract, he is bound to do, as the conditions on which he is authorised to use the machine.

CIRCUIT COURT OF THE UNITED STATES.

INDIANA—MAY TERM, 1845.

VAUGHAN v. WILLIAMS.

The provision in the constitution of the United States, and in the act of Congress of 1793, in regard to the surrender of a fugitive from labor, is binding on the state of Indiana, and its citizens, the same as on the other states.

A repugnancy between the compact in the ordinance of 1787, and the constitution, necessarily repeals the ordinance.

Indiana, by coming into the Union under the constitution, consents to this, and the other party to the compact consents by receiving the state into the Union.

This is the common consent required by the ordinance to annul it in part or wholly.

Full effect must be given to the constitution and law of Congress.

The laws of Missouri sanctioning slavery must be respected, and rights under them enforced.

Courts are not to discuss slavery in the abstract, or the policy of slave laws.

An individual is liable to the penalty for a rescue, if he be present and encourage it.

It is not necessary that he should put forth his hand to do the act.

An owner of slaves, who takes them to the state of Illinois, and keeps them at labor six months, and then removes them to Missouri, forfeits his right to them as slaves.

Messrs. *O. H. Smith* and *Wick* for the plaintiff.

Messrs. *Quarles*, *Stevens* and *Bradley* for defendants.

OPINION OF THE COURT.

THE plaintiff, a citizen of Missouri, brought his action against the defendant, for rescuing from his possession certain slaves of the plaintiff, and fugitives from his service, whom he found and arrested in the state of Indiana. The defendant demurred to the declaration.

As the principal ground of the demurrer it was insisted, that the fourth article of the constitution of the United States, in regard to the delivery of fugitives from labor, and the act of Congress on the same subject, do not apply where the claim is made by a citizen of a new state, not within the territorial limits of the Union at the adoption of the constitution. And that a citizen of Indiana is not bound by such provisions. That the sixth article of the ordinance of 1787, which remains in full force in Indiana, requires a fugitive from labor to be delivered up only when "claimed in any one of the original states." And that as the alleged slaves escaped from the state of Missouri, where the plaintiff still resides, neither the act of Congress nor the constitution can apply to the case.

This question, I believe, for the first time is brought directly before the Circuit Court of the United States.

It is admitted that the common law imposes no obligation on a sovereignty or its citizens, to surrender a fugitive slave, who escapes from the jurisdiction where he is held in slavery. The rights of the master cease, on common law principles, when the slave, by whatever means, shall escape beyond the operation of the local laws. And this is also the principle of national law. Unless under a treaty or by reciprocal legislation, a slave is free and cannot be reclaimed, when he enters a country where slavery is not sanctioned. And this would have been the case among the states of this Union, had not the constitution and act of Congress provided otherwise.

But it is supposed that the sixth article of the compact of the ordinance above referred to places Indiana, and also Missouri, on a different footing, in this respect, from the old states. It is true that this compact, or any part of it, cannot be annulled, without the common consent of the parties bound by it. And it is assumed that the people of Indiana, never having assented to any change in the compact,

are not bound to surrender a fugitive slave, except when claimed in one of the original states.

When the people of Indiana came into the Union as a state, they were as much bound by the constitution of the United States, as the people of any other state. And any and every part of the ordinance which conflicts with the constitution of the Union, so far as the state of Indiana is concerned, was consequently annulled. The common consent required to annul such part of the ordinance is found in the formation of a constitution, and consent to come into the Union, by the people of Indiana, and the acceptance of the constitution and recognition of the state by Congress. If it be admitted that while Indiana remained a territory, under the ordinance, there was no obligation to deliver up a fugitive from labor, except when claimed by a citizen of "one of the original states," it by no means follows that her obligation, as a state, is the same. On this subject the constitution acts upon a state and not on a territory. In every instance where the federal constitution imposes a duty on a state or the people of a state, it acts equally upon all the states. The argument that the articles of compact in the ordinance are paramount to the constitution, is unsustainable. The constitution is the fundamental law of Indiana and Missouri, the same as it is the fundamental law of Massachusetts and Virginia. This no one can doubt, who does not consider the ordinance of higher obligation than the constitution of the United States. Where any repugnancy exists between these instruments, the ordinance must yield by the consent expressed by the people of Indiana, and the people of the other states in Congress assembled.

In this argument, the question of slavery has been discussed, and the impolicy of the provision in the constitution requiring fugitives from labor to be surrendered. With this subject, in the abstract, this court has nothing to do. It is

argued that slavery had its origin in usurpation and injustice, and is continued in violation of the natural rights of man, as declared in our declaration of independence; but these are topics which this court will not discuss. We look to the law, and only to the law.

Whatever opinion may now be entertained as to the policy of introducing the above provision into the constitution, at the time of its introduction it was deemed a matter of the highest import. The fruits of the revolution trembled in the balance, whilst this and kindred subjects were discussed in the convention; and they were settled only by a spirit of compromise and of mutual concession. But if in this and other respects the constitution is less perfect than the parties, on either side, would have it, we are not the less bound by its provisions. If an alteration in the instrument be desirable, let it be made, or attempted to be made, in the mode provided. But while it remains the fundamental law of the Union, no good citizen will disregard its provisions. It was not deemed a perfect instrument, perhaps, in every respect, by a considerable proportion of those who formed it; but it was the best that could be adopted under the circumstances. It has saved us from anarchy and ruin. It has given us a national character, and a proud standing among the great nations of the earth. Under its protection, our commerce has flourished among the several states, and been extended to every sea. It laid the foundation of the prosperity and glory of our country. Whatever defects there may be in the instrument, no one can fail to see that its beneficial results exceed the power of human computation.

The demurrer is overruled, and the plea of the general issue being filed, the cause was referred to the jury.

CHARGE.

Gentlemen of the Jury—From the evidence it appears, that

the plaintiff purchased Sam, Mariah, and their child, from one Hendrick, in Missouri, 26th April, 1836, for the sum of eleven hundred dollars, five hundred dollars being paid down. He took the slaves into possession, and they remained with him until April, 1837, when they absconded. These persons formerly belonged to Tipton, a citizen of Kentucky, who, with the slaves, in October, 1835, removed to Illinois. He settled on military land, built a house, cleared ground, and made other improvements, declaring to different persons his intention to become a citizen of the state. Sam and Mariah were both employed in laboring in the fields and in the house, until April, 1836, when they were removed by Tipton to Missouri. Before this was done, there was much conversation in the neighborhood as to the right of the colored persons to their freedom. Tipton started with them before day-light, in the morning, being under some apprehension that they might, if discovered, be rescued. He sold them, in Missouri, to the person of whom the plaintiff purchased. Tipton continued to reside in Illinois two years, and, on several occasions, exercised the right of suffrage.

In the spring of 1844, the plaintiff heard that the slaves were residing in Indiana, Hamilton county. Taking certain persons along with him, to prove his purchase of the servants, and to identify them, he went to Indiana. Under the statute of that state, he procured a warrant to arrest the fugitives, and a constable to execute the process, and some two or three other individuals, to render any assistance that might be necessary. They proceeded to the cabin occupied by the colored persons, in the morning, before day-light. Admission was refused them. They pried the door from its hinges, and threw down the chimney, when the inmates surrendered, acknowledging the plaintiff to be their master. Time was given to send for a neighbor, who, Sam alleged, was indebted to him fifty dollars. That

neighbor arrived, and in a short time others, who expressed a strong interest in behalf of the slaves, and that they should not be taken from the neighborhood. The plaintiff alleged that he had no desire to take the fugitives by force, that they should have a fair trial, and if held to be free, he should be content. He agreed to pay Sam for his improvements, and other property. Some difference of opinion was expressed as to the justice before whom the fugitives should be taken; but the plaintiff finally decided that he would take them to Noblesville, a village some miles distant. They set out for that place, the company continually increasing, until they arrived at Mr. Anthony's farm, where they stopped for breakfast. The plaintiff was averse to this, but yielded, of necessity. After some two or three hours' delay, the company, being greatly increased, set out again for Noblesville. A wagon from Mr. Anthony was procured, to convey the fugitives. They moved on at a very slow pace for a few miles, until they arrived at the forks of the road,—one road leading to Noblesville, and the other to Westfield. Here the company increased to about one hundred and fifty. There was great division of opinion which route should be taken. Mr. Bales addressed the assemblage, urging a submission to law, and saying, if the decision shall be against us, under our statute, we have a right to an appeal. This pacified a majority, and there seemed to be a general acquiescence in the advice given. But there were some who refused to acquiesce, and among them was the individual who drove the wagon. Receiving some encouragement from persons in the crowd, he drove his horses on the Westfield road. The plaintiff and one or two others attempted to stop the wagon, but they were unable to do so; a shout was raised, and the wagon was driven rapidly. The fugitives escaped, and have not since been seen by the plaintiff. Owen Williams, the defendant, was in the company, at the cabin, at Anthony's,

and at the cross-roads. He took an active agency in the proceedings, in behalf of the slaves, but was not seen near the wagon at the time it was driven off, nor was he heard to encourage the driver.

These are the facts, substantially, as proved in the case. The subject is one of great delicacy and importance. Rights are involved, sanctioned by the laws of Missouri, which we are bound to respect; and these rights are asserted under the constitution of the United States and the law of Congress.

The second section of the fourth article of the constitution provides, "that no person held to service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on the claim of the party to whom such labor may be due."

The act of the 12th February, 1793, after pointing out the steps necessary to enforce the claimant's rights, in the fourth section provides, "that any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, &c., when so arrested, &c., shall forfeit and pay the sum of five hundred dollars, for the benefit of such claimant," &c. To recover this penalty, this action has been brought.

The plaintiff has proved that he purchased and paid for the slaves in question in the state of Missouri, and in justice to him it is proper to remark, that in the prosecution of his claim in this state, he has taken no step which the law did not sanction. He proceeded under the law of Indiana, which, from the decisions of the Supreme Court of the United States, he was not bound to do. He has shown great moderation and kindness towards the persons claimed as his slaves, in agreeing to pay them for their property and in other respects. And at no time did he evince any other

disposition than to have his claim examined by a legal tribunal. That he acted throughout in good faith, believing that his rights were sustainable, there can be no doubt.

It seems that the defendant, Owen Williams, from shortly after the arrest up to the time of the escape of the colored persons, took an active agency in the movements of the company. He did not drive the wagon in which the fugitives were conveyed, nor is there any evidence that by word or action he contributed to the rescue, at the time it took place. But if he countenanced and encouraged from time to time, the movements of the crowd which resulted in the rescue, or being present, sanctioned it in any form, he is liable to the above penalty. A man cannot incite others to the commission of an illegal act, and escape the consequences by the plea, that he did not put forth his hand in the consummation of the act. Every one of the one hundred and fifty persons who were present at the forks of the road, and who encouraged the rescue, is responsible to the plaintiff. The combination was unlawful, as its object was to defeat a legal investigation of an asserted right. There is no security for life or property, except in a faithful administration of the laws. That citizens, whether opposed to slavery or not, in principle, should feel and express a solicitude, in a case like the one under consideration, that there should be a full and fair investigation, is natural and commendable. But the course of the law must not be obstructed. No citizen or number of citizens can interpose physical force and defeat legal rights, without incurring a high offence against society. The advice of Mr. Bales was honorable to him, and his example in giving it is entitled to commendation.

But there is another point in the case which is clear of all difficulty, if you believe the evidence, and which may supersede the examination of any other part of the cause; and that is, were not the colored persons entitled to their

liberty? Having been brought to the state of Illinois, which prohibits slavery, by their master, from the state of Kentucky, and kept at labor for six months, under a declaration of the master that he intended to become a citizen of that state, and who actually exercised the rights of a citizen by voting, there can be no doubt that the slaves were, thereby, entitled to their freedom. This conforms to decisions repeatedly made by the Supreme Court of Missouri. Such rulings are of the very highest authority in a case like the present. And it is believed that there is no decision to the contrary. The question has been decided by the highest court of the state, where the right of the claimant to be effective must be sanctioned, and that decision is against him. It is clear that the plaintiff had no knowledge whatever of the removal and employment of the slaves in Illinois, by their former master. The price he paid for them and every act in the case show, that he was wholly ignorant of this. A gross fraud was practised on him by the person of whom he purchased the slaves, and against him or Tipton he may have recourse.

A question is made whether the title to the plaintiff is not good, if the colored persons voluntarily returned into slavery. This question does not arise in the case, as there is no evidence that they went voluntarily to Missouri. But on the contrary, from the manner in which they were removed from Illinois, there can be no doubt that they were forcibly abducted by Tipton. And it appears that they sought the earliest opportunity to escape from their new master. As the claim to the services of these persons is not sustained, if you believe the evidence, which is not contradicted, you will find for the defendant, however improper his conduct may have been. If the fugitives were free, he is not subject to the penalty claimed of him.

[The jury in a few minutes returned a verdict for the defendant.]

UNITED STATES v. G. TAYLOR & SURETIES.

The validity of the act of 1820 which authorises the agent of the treasury to issue a distress warrant against a defaulting officer, and his sureties, may well be doubted.

The judicial power is vested, by the constitution, in the Supreme Court and in such inferior courts as Congress shall establish.

The issuing of the warrant is a ministerial act, but to decide in what case it shall issue partakes more of a judicial than a ministerial power.

The right of trial by jury is secured to every citizen, where the amount in controversy exceeds twenty dollars.

Cushing, district attorney, for plaintiffs.

M. G. Bright for defendants.

OPINION OF THE COURT.

THIS is an action of debt brought on the official bond of Taylor as marshal of the district of Indiana, assigning for breach of the condition of the bond, that a warrant of distress was issued by the solicitor of the treasury of the United States, against one James T. Pollock, receiver of the land office at Crawfordsville, and his sureties, for the defalcation of said Pollock, as receiver, directing said Taylor, as marshal, to seize the goods, chattels, lands and tenements of said Pollock and his sureties, &c. The warrant, being in due form, was received, 28th of April, 1838, for \$40,498 87, and duly came to the hands of Taylor the — day of May ensuing, but was never served.

To the declaration a general demurrer was filed and joinder.

The question was submitted, without argument, whether the law which authorises the procedure be constitutional.

Doubts are entertained as to the constitutionality of this law; but as it has been acted under since its enactment, and no question raised as to its repugnance to the constitution, the court would not hold it void, at least without an argu-

ment. But two or three suggestions will be made, the accuracy of which may be tested by certifying a division of opinion, or by writ of error, should the decision eventually be a final one.

The act in question was passed the 15th of May, 1820, and is entitled "an act providing for the better organization of the treasury department." The 2d section provides that "any officer who shall have received the public money before it is paid into the treasury of the United States, shall fail to render his account, or pay over the same in the manner or within the time required by law, the amount due shall be certified by the comptroller to the agent of the treasury, who is required to issue a warrant of distress against such delinquent officer and his sureties," &c.

The third article of the constitution provides, "that the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the Congress may, from time to time, ordain and establish." And in the seventh article of the amendments to the constitution it is declared, "that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

Now, the statement of an account is a ministerial duty, and also the issuing of a warrant, but the exercise of a judgment whether the case comes within the statute can scarcely be held a ministerial act. There are indeed many acts required to be done by treasury officers, which partake more of a judicial than a ministerial character. Treasury officers, of necessity, decide on claims, on the evidence produced. We will not stop here to inquire whether Congress may not, under the power to establish inferior courts, authorise the treasury to decide certain claims. Practically, the treasury officers who act upon these, exercise judicial powers—not in form, but in substance. No formal pleadings are filed, but the claim is stated for property purchased

by the government, or for services rendered, and a final decision is made. There is no appeal except to Congress, as the government cannot be sued. No one has ever doubted this power.

But the nature of the power under consideration is very different from this. A warrant is authorised to be issued against the defaulter, without notice and without investigation, except merely turning to the books of the treasury, and ascertaining the amount charged. And under the warrant, the goods and chattels, lands and tenements, of the defaulter, are taken and sold on short notice; and if the sale of these be insufficient to pay the amount due, his body is taken and imprisoned. And this warrant also authorises the marshal to take the goods and chattels, lands and tenements, of the surety, and sell them on short notice. Here is no inquiry as to the due execution of the bond by the surety, or the amount which his principal owes. He may have claims of set-off against a part or the whole of the sum claimed.

This procedure deprives the citizen of the right of a trial by jury. It is a most harsh and unnecessary proceeding, and must always be injurious, if not ruinous, to the parties against whom it is instituted.

In a judicial proceeding, unless the defendant had actual or constructive notice, a judgment is treated as a nullity. And it would seem to be the dictate of natural justice, that no individual should be prejudiced by any proceeding, judicial or otherwise, without notice. But, as the courts of the United States have sustained jurisdiction, on a treasury warrant, and as the question is a very important one, with the consent of the parties and at their request, the court will certify to the Supreme Court the question of jurisdiction, and will not now decide it.

The case was not carried to the Supreme Court.

Starr & Smith v. Taylor, Moore & M'Griff.

STARR & SMITH v. TAYLOR, MOORE & M'GRIFF.

Where an attachment is laid upon goods, they are taken from the possession and control of the defendant, the same as where an execution is levied.

If under such circumstances, the goods are lost without fault in the sheriff, the loss must fall on the defendant.

But if the sheriff fail to use ordinary vigilance to keep the goods safely, and they are lost through his negligence, he is liable.

And the defendant may set up the levy as a satisfaction, if the value of the goods be equal to the amount of the judgment.

The sheriff is the agent of both parties, and is liable to either, but in such a case the defendant is not bound to sue him.

Messrs. O. H. Smith and Gregory for plaintiffs.

Messrs. Judah, Mace and Beard for defendants.

OPINION OF THE COURT.

THIS action is founded upon a promissory note given for goods purchased at New York. In their defence, the defendants set up that a large amount of goods, to wit, of the value of \$2,800, and for a part of which the above note was given, was attached at Buffalo, in the state of New York, by Frost & Dickerson, on a claim against the defendants, for five hundred dollars. That the plaintiffs came in under the attachment law of New York as creditors, and filed the above note as the foundation of their claim; and that the warehouse in which the goods were deposited was burnt, and the goods destroyed by the negligence of the sheriff who laid the attachment, and who took the goods into his custody.

The thirty-seventh section of the attachment law of New York, Revised Stat. 8, provides, that "an affidavit may be filed with the officer who issued a warrant of attachment, specifying the sum due," &c. And the thirty-eighth section

declares, "that upon the filing of such an affidavit and petition such creditor shall, in all respects, be deemed to be an attaching creditor, and entitled to the same benefits and advantages, and subject to the same responsibilities and obligations, as the creditor at whose instance such attachment was originally issued."

Various objections were made to the original attachment, and to the affidavit on which it was issued. But the court held, that as the plaintiffs became parties to the attachment by filing their claim, they cannot, under the pleadings in this case, object to the legality of that procedure. The property was held under the attachment, as much for the benefit of the plaintiffs, as for the benefit of the plaintiffs in the attachment.

The great question in the case is, on the facts proved, whether the loss of the goods may be charged to the negligence of the sheriff.

The goods were taken out of the possession of the defendants by the attachment, and after this they were in the custody of the law. The seizure of goods on execution is a bar to any other execution against the defendant for the same debt. And on the same principle, such levy may be pleaded in bar to any other suit for the same demand. After a sale of the property, the satisfaction of the judgment could only be set up *pro tanto*. *M'Intosh v. Chew*, 1 Black. 290; 4 Mass. 403; 2 Ld. Raymond, 1072. The same principle applies on the laying of an attachment.

Until the sale of the property on an attachment or an execution, the plaintiff does not realise the fruits of the proceeding, and consequently, he is not responsible for the safe-keeping of the property. And if it shall become lost by one of those casualties which often occur, and which are in no respect chargeable to negligence, the loss must be that of the defendant. This risk every defendant incurs, when he suffers his property to be taken in execution. He

is chargeable with neglect in failing to do what the law enjoins on him, and if a loss shall be the consequence, the fault is his own.

But if the sheriff or other officer who serves the process, and who has the custody of the property shall, by his neglect, suffer it to be injured or destroyed, he is responsible. He is bound to use at least ordinary vigilance for its safe-keeping. Should live stock be levied on, the sheriff is bound to provide for its support at the expense of the defendant. This expense should be paid on a sale of the stock. Story on Bailments, Sec. 46, 128, 129, 130 and 131. *Phillips v. Bridge*, 11 Mass. 242; *ib.* 211; *ib.* 163; *Langdon v. Cooper*, 15 Mass. 10; *Knap v. Sprague*, 9 Mass. 258; *Jenner v. Jolliffe*, 6 John. 9.

On the above considerations, the court instructed the jury that if they shall find, from the evidence, that the sheriff failed to exercise that degree of vigilance which a careful man would use in the protection of his own property, and it was consequently lost, they should find for the defendant.

The sheriff is the agent of both parties. And if he be guilty of negligence, so that the property becomes lost, he is responsible to the plaintiff, at least to the amount of his judgment. The sheriff is also liable to the defendant in such a case, but the defendant is not bound to prosecute him. The plaintiff, through the instrumentality of the law, having taken the goods from the possession and control of the defendant, he may set up the levy in discharge of the judgment, and a loss of the goods, through the negligence of the sheriff, will not invalidate that plea. The jury found for the defendant.

SMITH & SAMPLE v. ATWOOD & Co.

A contract made in Pennsylvania and sued on in Indiana, in regard to the remedy cannot be governed by the law of Pennsylvania.

Such a rule is impracticable, and cannot be enforced.

The law of the contract accompanies it, and must govern it; but that relates to the rights and obligations of the parties, and not to the remedy.

Mr. O. H. Smith for the plaintiffs.

OPINION OF THE COURT.

On the 9th of November, 1839, Smith and Sample, at Philadelphia, in the state of Pennsylvania, executed their promissory note to Atwood & Co., payable six months after date. A judgment was entered on the note in November, 1842, for \$1725, in the Circuit Court of the United States, in Indiana; and execution was issued, which was levied on the real estate of the defendants.

The law of Pennsylvania prohibits the sale of lands on execution, if the rents and profits for seven years shall be appraised by twelve men to a sum sufficient to satisfy the judgment and costs, &c.; and if such return shall be made, and confirmed by the court, a *levari facias* shall issue to sell the rents and profits; and if they shall not sell for a sum sufficient, the plaintiff may have the land delivered over to him, &c.

The laws of Indiana, at the date of the contract, and when suit was brought, required the rents and profits to be first offered, and if they shall not sell for a sum sufficient to pay the debt and costs for seven years, then the fee of the land may be sold for the best price it will bring.

On the above facts, a motion was made to set aside the

return of the marshal, and that he be directed to collect the money under the laws of Pennsylvania.

In support of this motion, the case of *M Cracken v. Hayward*, 2 Howard, 608, is referred to, where the court say—“The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them by the one party, and the right acquired by the other.” And again, “The obligation of the contract between the parties, in this case, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant, till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws, giving these rights, were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations, in the very words of the law, relating to judgments and executions.”

If this opinion be law, it is contended, the law of Pennsylvania is as much a part of the contract as if it had been incorporated in it. This must be admitted. The court referred to the remedy in the case cited, and the principle laid down must apply to all contracts. If the remedy be a part of the contract, the mode of its enforcement must be found not in the state where suit is brought, but in the state where the contract was made, or was to be performed. No proposition can be clearer, than that the law of the contract follows it wherever it may be enforced. And, on the ground assumed, by the mere force of the contract the remedy is kept alive, in the state where it was made, or elsewhere, in disregard of the legislative power.

That this is the case, so far as regards the legality of the

contract, is undoubted; but that the remedy constitutes a part of the contract, it is believed, was never before asserted by any court. The law of Pennsylvania cannot regulate the sale of real estate, by execution or otherwise, in Indiana. And this shows the impracticability, if not the absurdity, of the rule contended for. The motion is overruled.

SEDAM v. TAYLOR ET AL.

To an action on a marshal's bond, for taking insufficient security on a replevin bond, a plea that a levy was made on goods and chattels, lands and tenements, sufficient to satisfy the judgment, is good in bar.

Such a plea is good in bar to an action brought on an injunction or appeal bond.

Mr. *Wright* for the plaintiff.

Messrs. *Morrison & Bright* for the defendants.

OPINION OF THE COURT.

THIS action is brought on the official bond given by the defendant Taylor, as marshal, for taking insufficient security on a replevin bond.

The defendants pleaded that, after the taking and return of the replevin bond, a *fi. fa.* was issued and placed in the hands of the marshal, who, before the bringing of this suit, did levy on divers goods and chattels, lands and tenements of the said sureties in the replevin bond; to the full value of the judgment interests and costs, which levy remains undisposed of, &c.

To this the plaintiff replies, that the lands and tenements levied upon by the *fi. fa.* were subject to a prior lien of a judgment against the said sureties, for the sum of \$2760.38,

D. C. Wallace v. Charles Dewey.

on which execution was issued, and the above land sold, the proceeds of which sale were insufficient to pay that judgment, &c.

To this replication, the defendants demurred.

The replication is bad, as it does not answer the plea. In the plea, the levy is alleged to have been on divers goods and chattels, lands and tenements. The plea does not answer to the goods and chattels, but to the lands and tenements only. The replication may be true, and the plea of the defendant may, notwithstanding, be a bar to the plaintiff's action.

The sureties of the marshal were bound collaterally, for the performance of his duty. The plaintiff, in this action, seeks to make them liable, where the plea avers there was a levy on goods, &c., to the full value of the judgments. This is, clearly, a bar to the action.

Such a levy is a bar to an action on an injunction or appeal bond. *Cass v. Adams et al.*, 3 Ohio, 223; *M'Intosh et al. v. Chew et al.*, 1 Black. 289.

On leave, the replication was amended.

D. C. WALLACE v. CHARLES DEWEY.

Where a deed purports to have been executed by the trustees of a town, there must be evidence that the persons who signed it were trustees, and that they had power to make the conveyance.

An acknowledgment of a deed before a clerk of the court, in Kentucky, is not good without evidence that the person taking the acknowledgment was clerk.

Mr. O. H. Smith for the plaintiff.

Messrs. Morrison and Bright for the defendant.

OPINION OF THE COURT.

THIS is an action of ejectment. The plaintiff offered a deed in evidence from the trustees of the town of Clarksville, to John Harrison, dated 3d September, 1794, recorded the 27th September, 1818. And also a deed from Harrison to the plaintiff, for the premises, dated 4th January, 1817, and recorded 4th March, 1818.

The deeds were both objected to.

The first deed is inadmissible, as it does not appear that the persons who signed it were trustees of Clarksville, at the time, and had power to make the conveyance. And the second deed must be rejected, as it purports to have been acknowledged before the clerk of the court of Jefferson county, and there is no evidence of his being clerk. Nor is there any evidence of the genuineness of the deed. Judgment of non-suit.

BUCKINGHAM v. BURGESS & M'CANAHA.

The admission of one defendant does not go to charge his co-defendant.

Where an individual represents himself as a partner in a certain firm, or permits others to do so, he is responsible as a partner.

And this is the case, although he may not, in fact, have had any interest in the firm.

Mr. *O. H. Smith* for plaintiff.

Mr. *Newman* for defendant.

OPINION OF THE COURT.

THIS action is brought for work and labor in cutting and packing pork, amounting to eleven hundred dollars. In

their defence, the defendants set up that plaintiff was in partnership with John Mahard & Brothers, who purchased the pork, became bankrupts, and never paid for it.

It was proved that Mahard & Brother were in partnership in Cincinnati, and also in New Orleans, and that the plaintiff in 1841, did his business in the pork house of the Mahards in Cincinnati. That after the pork was cut and packed, it was consigned to the house of the Mahards in New Orleans, which sold the pork.

The house of the Mahards at Cincinnati were proved to have been in partnership with the plaintiff prior to this transaction, but there was no evidence to show that that partnership had been wound up in 1839-'40. But there was some evidence conducing to show that the plaintiff held himself out as the partner of the Mahards in 1841.

The account on which the action is brought, was made out by the clerk of the plaintiff, and handed to Burgess, one of the defendants, who acknowledged it was correct.

The court instructed the jury, that the admissions of Burgess did not bind his co-defendant, M'Canaha.

Also, that if the plaintiff, or others in his presence and hearing, represented him to have been, at the time of the pork transaction, in partnership with the Mahards, and the defendants were present, and were on that ground induced to employ the plaintiff, they should find for the defendants; and, also, that under the statute of Indiana, they should find against the plaintiff the sum due on the partnership account.

That where an individual permits himself to be represented as a partner of a firm, and thereby gives credit to the firm, he is justly held responsible, although in fact he may have no interest in the partnership.

The jury found for the plaintiff the damages claimed.

GIBSON v. STEVENS.

Money fraudulently obtained from a bank may be sued for before the note given to the bank, for the same, becomes due.

A forged note to the bank is no payment, and the bank may sue for the money advanced by it.

An action of trover for the bank notes, or for the property purchased with them, would have been the proper action.

But, in such a case an action of *indebitatus assumpsit* will lie.

A suit for the original consideration, disregarding the fraudulent note, is not, in fact, an affirmance of the contract.

A receipt by the warehouse man for property to be forwarded to order and of payment, when assigned to a commission merchant, who makes an advance, does not create a lien on the property, paramount to that of an attachment laid before notice of the assignment.

The money advanced, not being equal to the value of the property, leaves an attachable interest, beyond the lien, if it exist, of the commission merchant.

On the attachment all the creditors may come in, under the Indiana statute.

Messrs. *Judah & Baird* for plaintiff.

Messrs. *Morrison & Mason* for defendant.

OPINION OF THE COURT.

THIS cause is submitted to the court, on facts agreed, substantially as follows: M'Queen and M'Kay, of Detroit, Michigan, about the 20th of March, 1844, by false pretences fraudulently procured the bank at Indianapolis, to loan to them the sum of about \$11,000 in notes of the bank, payable to bearer. With part of this money M'Queen and M'Kay purchased of Hanna, Hamilton & Co. 350 barrels of mess pork, for the sum of \$2,908 50, and received from them the following memorandum: "Fort Wayne, April 4th, 1844 Messrs. M'Queen & M'Kay, bought of Hanna, Hamilton & Co. 350 bbls. mess pork, to be delivered on board of canal boats soon after the opening of canal navigation. Received payment in full. Hanna, Hamilton & Co. We guaranty

the inspection of the above pork at Toledo, and the delivery on board of canal boats at this place, (Fort Wayne,) soon after the opening of canal navigation. Hanna, Hamilton & Co."

At the time of this purchase, the barrels of pork were in the warehouse of the said Hanna, Hamilton & Co., at Fort Wayne, Indiana, on the Wabash and Erie Canal, marked and branded "mess pork," together with a large number of other barrels of pork marked "prime pork" and "clear pork." There were no other barrels at that or any subsequent time marked "mess pork" in said warehouse. The barrels were not seen by M'Queen & M'Kay, they being intermixed with other barrels.

At the same time, M'Queen & M'Kay purchased with a part of the money obtained as aforesaid, 200 barrels of flour, and received the following memorandum: "Fort Wayne, April 4, 1844. Messrs. M'Queen & M'Kay bought of D. & J. A. T. Nichols 200 bbls. superfine flour at \$3 56½, \$712 50. Received, Fort Wayne, April 4, 1844, payment in full. D. & J. A. T. Nichols. Received the above flour in store at Fort Wayne, April 4, 1844, which we agree to deliver on board canal boats here, soon after the opening of navigation, subject to the order of M'Queen & M'Kay. D. & J. A. T. Nichols. We guaranty the inspection of the above flour in New York, as superfine flour;" signed as above. This flour, when purchased, was in the warehouse of the said Nichols, at Fort Wayne. On the 17th of April, 1844, M'Queen & M'Kay, on the presentation of the above memoranda to Gibson, the plaintiff, in the city of New York, a commission merchant, procured an advance on the same of \$2,787 50, and M'Queen & M'Kay by indorsements thereon of the above date, directed the pork and flour to be delivered to the plaintiff or his order.

On the same day, M'Queen & M'Kay wrote and handed to Gibson the following letter: "New York, 17th April,

1844. Messrs. Ludlow & Babcock, gentlemen: We have this day received an advance from E. T. H. Gibson, Esquire, on the following lots of pork, which you will have the goodness to deliver to his order, and to comply with his instructions relative to shipments, viz: 355 bbls. mess pork; 225 bbls. prime pork, from warehouse of Walker, Rogers & Co.; 11 bbls. mess, at Benbridge & Mix's warehouse; 300 barrels mess at Hamilton & Williams' warehouse; 350 bbls. mess at Hamilton, Hanna & Co.'s warehouse; 200 bbls. flour at D. & J. A. T. Nichols' warehouse." On the succeeding day Gibson enclosed the above letter in one written by himself and directed to Mott & Co., Toledo, Ohio, which was received in the due course of the mail, and the above letter of M'Queen & M'Kay which was enclosed, was received by Ludlow & Babcock, at Toledo. On the same day Gibson wrote to Ludlow & Babcock, that he had made to M'Queen & M'Kay an advance on 1250 barrels of pork and 200 barrels of flour, which were stored at different points on the line of the Wabash Canal, and which they state "is to be shipped to your care and held by you at Toledo, until you receive instruction from them respecting it. They have given me an order on you for it, which I have sent to Mott & Co. I wish you to ship the pork and flour to me immediately on its arrival at Toledo."

At the time the memoranda of the purchases were indorsed to the plaintiff, it was usual for commission merchants residing and doing business in the city of New York to make advances on western produce, upon the assignment of proper evidences of title thereto. The plaintiff sent Hoyt, his agent, to Fort Wayne, to superintend the shipment of the pork and flour. He arrived at Fort Wayne the 29th of April, but on the 27th of that month a writ of attachment, issued by the Allen Circuit Court of the state of Indiana, in the name of the bank, against M'Queen & M'Kay was laid upon the pork and flour, and the sheriff retained pos-

session of the property attached, until it was taken out of his possession by the writ of replevin in this case.

The plaintiff made the advancement under a contract that, as commission merchant, he should sell the pork and flour, and, after paying himself for his advances, commissions and expenses, pay over the balance to M'Queen & M'Kay.

The attachment and proceedings thereon are admitted to have been regular, and by the statute of Indiana, goods attached may be replevied.

It is admitted that in the obtainment of the loan from the bank, M'Queen & M'Kay were guilty of fraud, and that the bank on that ground might have disaffirmed the contract and brought trover for the bank notes, or for the pork and flour which were the proceeds of the notes, before the credit on the loan had expired; but it is insisted that by suing out the attachment the bank affirmed the contract of loan, and consequently the action cannot be sustained before the expiration of the credit.

That trover would have been the better form of action for the bank, as regards the pork and flour now in controversy, there can be no doubt. But it is not probable that an action of trover could be sustained for the notes, as proof of their identity would be required.

In *Ferguson v. Carrington*, 9 Barn. & Cres. 59, it was held, that where goods were purchased fraudulently, an assumpsit for goods sold and delivered, could not be sustained before the time of credit expired, though the vendor might have treated the contract as a nullity, and have brought trover immediately to recover the value of the goods. The same case is reported in 3 Carr & Payne, 457. In *Hanna v. Mills*, 21 Wend. 90; *Yale v. Coddington*, *ib.* 175, it was decided "that where goods were sold to be paid for by a note or bill payable at a future day, which is not delivered according to the terms of the sale, the vendor may

sue immediately for a breach of the special agreement, and recover, as damages, the whole value of the goods, allowing a rebate of interest during the stipulated credit; but that he could not maintain assumpsit on the common counts, until the credit has expired." But in *Corlies v. Gardner*, 2 Hall, 345, the court held that an assumpsit for goods sold, could be maintained under circumstances similar to the above; they say "that the sale and delivery of the goods were conditional, and that the plaintiffs might reclaim their goods, or treat the sale as an absolute one without credit." The decision in the case of *Dutton v. Solomonson*, 3 B. & P. 582, is contra.

In *Campbell v. Sewell*, 1 Chitt. Rep. 609, and 4 Moore, 532, it was held, "that the plaintiff could not declare in *indebitatus assumpsit* for goods sold, at least before the expiration of the time at which the bills would have become due, but should have declared specially." Where a bill of exchange, given in payment for goods sold was, upon presentment to the drawee, refused acceptance, it was held, that the holder was not bound to present the bill a second time; nor to return it, and that the holders having declared against the drawer on the bill, and joined counts for goods sold, may treat such bill as a nullity, and recover his demand on the latter counts, although the credit on the bill be not expired. *Heikling v. Hardy*, 1 Moore, 61; 7 Taunt. 312; *Smith v. Hodson*, 4 Term, 211; 1 M. & R. 2.

If a person without authority sell goods belonging to another, and receive a negotiable note in payment, the owner may waive the tort, and maintain an action against him for money had and received, to recover the proceeds of the sale. *Whitwell et al. v. Vincent*, 4 Pick. 449. An action for goods sold and delivered will lie, although payment was to be made by a note on demand, immediately on a failure to give such note. *Loring v. Gurney*, 5 Pick. 15. In *Man. & Mech. Bank v. Gore et al.*, 15 Mass. 75, "the bank finding

the security upon which they had agreed to make the loan, had failed by reason of the forgery of the names of the indorsers, and that they had thus been defrauded of a large sum of money, commenced this action, declaring for money had and received, although the term of credit agreed upon for the loan had not expired." "It is a case," the court say, "as respects the plaintiffs, of money obtained from them by misrepresentation and fraud; and we think the only question is, whether upon a loan thus obtained, although upon credit, the bargain may not be disaffirmed by the lender, and an action presently commenced for money so obtained, as had and received, in a legal view, to his use; and upon this we have no doubt." And they observe, "there can be no question of the soundness of the principle, or of its applicability to this action. Here the credit was obtained upon an offer of adequate security. The security was wholly worthless. The consideration for the credit, therefore, failed, and the money thus wrongfully obtained, could not for an instant be conscientiously retained. *Ex æquo et bono*, then it ought to be returned; and that is the foundation of the action for money had and received."

Indebitatus assumpsit lies to recover the price and value of goods which the defendant, by fraud, procured the plaintiff to sell to an insolvent, and then got into his own possession; for he could not set up the sale, because his own fraud had procured it; and the mere possession of the plaintiff's goods, unaccounted for, raises an assumpsit to pay." *Hill v. Perrett*, 3 Taun. 274; *Smedley v. Goodwin*, 3 M. & Selw. 191; *Bennet v. Francis*, 4 Esp. 28.

When a sale is fraudulently procured by the vendee, he may be sued by the vendor for the value of the goods, even before the expiration of the credit agreed to be given. *De Symons v. Minchwinch*, 1 Esp. 430; *Arden v. Sharpe*, 2 ib. 523, 524; *Sever v. Dingley*, 4 Greenl. 306.

In *Wilson v. Force*, 6 Johns. 110, the plaintiff sold a horse and gig to the defendant for a note on Whaley, which was not due for several months. Whaley was represented by the defendant as good, when he knew him to be insolvent. Plaintiff afterwards offered to return the note and demanded payment, which evidence, under the count for goods sold, the court overruled, and on that ground the Supreme Court reversed the judgment; and in their opinion said, "if the special contract was void on account of fraud, the plaintiff may disregard it, and bring assumpsit for the goods sold. That the note was no payment." The same doctrine is found in 1 Com. on Cont. 38.

In *Stedman v. Gooch*, 1 Esp. Rep. 3, Lord Kenyon said, "if in payment of a debt, a bill or note is taken, payable at a future day, the creditor cannot legally commence an action, until such note or bill become payable, or default be made in the payment; but if such bill or note be of no value, as if, for example, drawn on a person who has no effects, and who, therefore, refuses it, the creditor may consider it as waste paper, and resort to his original demand, and sue the debtor upon it." It appears when the goods were purchased in that case, the notes were taken in payment. The same principle is sanctioned in *Packford v. Maxwell*, 6 Term, 52. To this doctrine is opposed the case of *Ferguson v. Carrington*, above cited, and some other cases. These cases rest upon the simple ground that an action for goods sold and delivered, or money had and received, affirms the contract. Now this assumed ground is unfounded in fact and in law. An action brought before the credit expires, cannot be said to be brought in affirmance of the contract, but in disaffirmance of it. The action is maintainable only upon the ground that the note given in payment being of no value on account of the fraud, may be treated as void, and an action brought immediately for the goods or money obtained

through its instrumentality. And in such case, the only defence that could be set up would be the fraud through which the credit was obtained. Is this admissible? Such a position would be absurd. In this case M'Queen & M'Kay by a gross fraud obtained the money from the bank, the security given to the bank being of no value; and although they have appropriated the money as admitted in this case, yet they contend they are not liable to an action for money had and received, until their credit, fraudulently obtained, shall have expired.

Had the bank claimed the pork and flour specifically, by an action of trover or replevin, as the proceeds of the money fraudulently obtained from it by M'Queen & M'Kay, its right to the whole of the property would have been clear, but having issued an attachment, it can claim only as a general creditor, and under the statute other creditors may file their claims. But the only point now under consideration is, has the action been prematurely commenced?

In the case of *Cary v. Curtis*, 3 Howard, 255, Mr. Justice Story says, "it is an entire mistake of the true meaning of the rule of the common law, that the action of assumpsit for money had and received is founded upon a voluntary express or implied promise of the defendant, or that it requires privity between the parties, *ex contractu*, to support it. The rule of the common law has a much broader and deeper foundation. Whenever the law pronounces that a party is under a legal liability or duty to pay over money belonging to another, which he has no lawful right to exact or retain from him, there it forces the promise upon him, *in invitum*, to pay over the money to the party entitled to it. It is a result of the potency of the law, and is in no shape dependent upon the will or consent or voluntary promise of the wrongful possessor."

I think the suit may be sustained, there being fraud in the security, though the credit had not expired. An action of trover for the bank notes, without proving the notes, could not be sustained; and this could not be done in one case in a hundred.

It is admitted there was no sale of the property by M'Queen & M'Kay. They indorsed to Gibson, in New York, a commission merchant, the receipted bills of parcels, showing the purchase and payment by them for the pork and flour, and a guarantee that both should pass inspection, &c., and the great question in the case is, whether the advance made by Gibson creates a lien on the pork and flour paramount to the lien of the attachment. There is no evidence that the plaintiff, when he made the advance, had any notice of the fraud of M'Queen & M'Kay. He must then be considered as having acted fairly; and it is admitted that it was usual for commission merchants, in New York, to make advances on western produce upon the assignment of the proper evidence of title thereto. Whether this "proper evidence of title," consists of such memoranda of purchase as were transferred to the plaintiff in this case, is not stated.

From the letters of M'Queen & M'Kay, to Ludlow & Babcock, commission merchants of Toledo, Ohio, handed to the plaintiff the day he made the advance, and which is made a part of the case, it appears the advance was made on the pork and flour above stated; and nine hundred other barrels of pork "stored at different points on the Wabash canal." This also appears from a letter written on the same day by the plaintiff, and directed to the same persons, which is also in evidence. It seems, however, to have been the intention of the parties to the agreement, to raise the legal question on the pork and flour attached.

No letters were written to Hanna, Hamilton & Co., or D. & J. A. T. Nichols, of whom the pork and flour now in

controversy were purchased, informing them of the orders given to the plaintiff; nor had they any knowledge of such orders until after the attachment was laid.

The memorandums of purchase with their indorsements have been compared, in their effect, to indorsed bills of lading. A bill of lading possesses many of the qualities of a bill of exchange. In the language of Lord Ellenborough, if a consignee "indorse a bill of lading for a valuable consideration, and without notice by the indorser of a better title, it passes the property." This deprives the owner of the right to stop the goods in transitu. When the indorsement is made in blank, it may be filled up as on a bill of exchange. 6 East., 21, 22; *Wright v. Campbell*, 4 Burr. 2046; *Tucker v. Humphreys*, 4 Bing. 522; *Caldwell v. Ball*, 1 Term, 205; *Hubbert v. Carter*, *ib.* 745; 3 Kent. Com. 207.

The memorandums in question are neither in form nor effect, like bills of lading. Have they the character of warehouse receipts? These instruments take their form and effect from usage; consequently, they vary in both these particulars, as usages differ at different places.

In *Akerman v. Humphrey*, 1 Car. & Payne, 44, it was held, that a consignee of goods delivering over to a third person, the shipping note of such goods, and a delivery order on the wharfinger to deliver such goods as soon as they arrive, does not pass the property in them, so as to prevent a stoppage of them in transitu by the consignor. In his opinion in that case, Burrow, Justice, said, "I do not think that the giving the shipping note and delivery order to the plaintiff, made a change of the property." The acceptance of a delivery order by the vendee is not equivalent to an actual acceptance of the goods within the meaning of the statute of frauds. The court say "they" (the warehouse men) "held it originally, as the agent of the vendors; and as long as they continued so to hold it, the property was unchanged." It has been said, "that the London Dock Com-

pany were bound by law, when required, to hold the goods on account of the vendee. That may be true, and they might render themselves liable to an action for refusing so to do; but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance of them by him until he actually took possession of them."

After a contract for the sale of goods and a written order on the wharfinger for delivery, communicated to the wharfinger, and assented to by him, though no actual transfer be made on his books, the property passes to the vendee. *Assignees of Dorman v. Darrian*, 7 Taunt. 270. In *Harvey et al., assignees, v. Liddiard*, 1 Starkie, 181, it was held, that where "A, shortly before his bankruptcy, draws a bill, and having procured it to be discounted, gives B, a creditor, an order to receive the amount which he directs C, who discounted the bill, to transmit to B; whilst the money is in the hands of the carrier, A commits an act of bankruptcy, B, who afterwards receives the money, is liable to A's assignees."

"An order by A to B, directing the latter to pay over to C, a creditor of A's, the proceeds of a cargo consigned by A to B, creates no lien in favor of C. *Holland & Humble, assignees*, 1 Starkie, 143. A shipping note and delivery order make no change of property; they do not amount to a bill of lading, which is exactly like a bill of exchange, and the property mentioned in it passes by indorsement. *Tucker v. Humphrey*, 4 Bing. 516. A merchant in London had been in the habit of selling goods to B, resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B by the first ship. In pursuance of a parol order from B, goods were delivered to, and accepted by, the wharfinger to be forwarded in the usual manner. Held that this not being an acceptance of the buyer, was not sufficient to take the case out of the statute of the 29 Car.

2, Ch. 3. *Hanson v. Armitage*, Barn. & Ald. 544. In *Bennet v. Goddard*, Mason Rep. 107, it was held that where goods were sold, lying in the vendor's warehouse, on credit, and they are sold by marks and numbers, so that no further designation is necessary, and it is a part consideration of the bargain that they may remain there rent free, at the option of the vendee, and for his benefit, until the vendor shall want the room; there is in point of law a complete delivery of the goods.

To constitute a lien there must be an actual or constructive possession of the thing, by the party asserting it; for a lien is a right to retain a thing, which presupposes a lawful possession, which can arise only from a just possession under the owner or other party against whom the claim exists. If the thing has not yet arrived at the possession of the party, but is still in transitu, or if he has only a right of possession, the lien does not attach thereon. Story on Agency, sec. 361. Chancellor Kent, in the second volume of his Commentaries, 638, says, possession of the goods is necessary to create the lien; and the right does not extend to debts which accrued before the character of factor commenced; nor when the goods of the principal do not, in fact, come to the factor's hands even though he may have accepted bills upon the faith of the consignment, and paid part of the freight. *Kinloch v. Craig*, 5 Term, 119, 783.

A sale of goods without delivery of possession is invalid as against an attaching creditor of the vendor. *Lanfear v. Sumner*, 17 Mass. 110. *Shumway v. Rutter*, 7 Pick. 56; *Parsons v. Dickerson*, 11 Pick. 352.

On their face the bills of parcels do not show and do not purport an actual delivery of the flour and pork, and there was in fact no formal delivery of either. The papers show an obligation by the warehouse keepers to deliver the pork and flour soon after the canal shall open, and that they shall both pass inspection. But in regard to the pork, the agreed

case admits that the barrels of pork were in the warehouse. A formal delivery of personal property is not necessary to change the title. A part, in the name of the whole, may be delivered; and frequently the delivery of the evidence of the transfer is considered a symbolical delivery of the thing sold. This question is controlled by commercial usages in reference to the nature and condition of the property. 1 East Rep. 194; *Atkinson v. Maling*, 2 Term Rep. 462.

The receipted bills of parcels and guarantees were not assignable as bills of lading. They contained evidence of the articles purchased, of payment and the guarantees, and as such were important to the purchasers: but whether the evidence of the articles purchased, the payment and guarantees, were contained on one or several papers, was immaterial. No usage is known or proved in Indiana or New York, which give to these papers any other effect than as evidence of the above facts. There was no condition expressed or understood that the pork and flour were to be delivered to the holder of the papers, or that their production was necessary to obtain the property. A simple order for the pork and flour to Gibson, would have had the same effect, as the indorsement of the above papers.

If M'Queen & M'Kay had given an order to the warehouse men to deliver the property to any one, they would have delivered it, without incurring any liability to Gibson, they having no knowledge of his claim. Had M'Queen & M'Kay taken the property into their own possession, they would not have been responsible to Gibson for the value of the property, but only for the advance, including interest and damages for a violation of the contract. There having been no sale, and the property not having passed into the actual possession of Gibson, he could not have recovered the property by any legal process, even from the possession of M'Queen & M'Kay. Had the property passed into the possession of Gibson after notice, he could not, as the factor

of M'Queen & M'Kay, have sold more of it than would refund his advance, interest and charges. But not having possession of the property, he could not, in equity, enforce against it his claim to any thing beyond an indemnity.

But the case does not turn upon this principle. Before any notice was given, the bank laid an attachment on the property. Neither the warehouse men or the bank knew any thing of the advance of Gibson, or of the order, until after the attachment. But suppose there had been notice, M'Queen & M'Kay had an attachable interest in the property. The first cost of the pork and flour exceeded the advance about a thousand dollars. M'Queen & M'Kay, then, to this extent, at least, were interested in the property, and that interest was attachable. By the 383d section of the execution laws, Revised Code of 1843, all the interest of a mortgagee, pledgee, or assignee of personal property is liable to be levied on and sold by execution. And in the case of *Evans v. Darlington*, 5 Blackf. 320, the court held there, the same interest may be reached by an attachment.

If the lien asserted by Gibson be good to the extent as contended, it withdraws the property from the state of Indiana, and compels the creditors of M'Queen & M'Kay who reside in the state, to follow it to the state of New York. And the principle would be the same, had an advance of one thousand dollars been made on ten thousand dollars worth of property. So careful is the law of the rights of creditors, that an executor under a foreign jurisdiction cannot withdraw the property of the deceased from the local jurisdiction, to that of the domicil of the deceased, to the prejudice of creditors. Much more, it would seem, cannot this be done in the case under consideration; a case where in fact there has been no sale; and where, if the lien of the commission merchant attached, it could only extend to the advance made.

In *Black et al. v. Zachara*, 3 Howard, 511, the Supreme Court held, that an attachment of bank stock in Louisiana, which had previously been assigned by the owner in South Carolina, of which the plaintiff in the attachment had notice, before the writ was issued, could not be sustained. The court say, "now in the case before us, there is plenary evidence that the assignment was valid and effectual by the laws of South Carolina, when and where it was made, to pass the right to the property in controversy; and that the attaching creditors had notice thereof before their attachment was made."

And so in a late case in the Supreme Court of Louisiana, where the effects of the United States Bank were attached in that state, after a due assignment of them had been made in the state of Pennsylvania, of which the attaching creditors had notice, it was held the attachment could not be sustained. This case, and the one above cited, are made to turn on the fact of notice. And if in the case under consideration, before the attachment was laid upon the property, the plaintiff had had notice of the order, the lien of Gibson to the extent of his advances would have been protected.

In *Babcock v. Maltbie*, 19 Martin, 137, the court say, the true test in cases of assignment is, "that where the owner of the property has lost all power over it and cannot change its destination, the creditors cannot attach." This rule is apparently sanctioned by the Supreme Court of the United States in the case above cited; but it is not true, except upon the supposition that the whole transaction was *bona fide*. For if a man fraudulently transfer his goods, he has lost all power over them, but his creditors may attach them. In the case of Gibson, M'Queen and M'Kay, before the notice, had power to sell the property and transfer a good title.

In Story's Conflict of Laws, sect. 416, it is said, "neither is it true, that even the voluntary conveyances of parties in

all cases are to be held valid, where they are prejudicial to the rights and remedies of our own citizens. In Massachusetts, for instance, it has been held, that a voluntary assignment by a debtor of all his property, made in Pennsylvania, for the benefit of creditors generally, shall not prevail over a subsequent attachment of the funds of the debtor, made after the assignment, because such an assignment would be void by the laws of Massachusetts, if made in that state, as being in fraud of creditors; and it is unjust and unequal in its effects, and prejudicial to the citizens of the state." "In such a case, therefore, the party who shall by process first attach the debt or seize the property, ought to prevail, whether creditor or assignee." *Ingraham v. Geyer*, 13 Mass. R. 146; *Oliver v. Towns*, 6 Pick. 97, 307, 286: and Chancellor Kent, 2 Comm. 406, says, "it may be considered as part of the settled jurisprudence of this country, that personal property, as against creditors, has locality, and the *lex loci rei sitæ* prevails over the law of the domicil with regard to the rule of preference in the case of insolvent estates."

In *Lanfear v. Sumner*, 17 Mass. Rep. 110, the court held, "A conveyance made in Philadelphia to plaintiff of a quantity of tea on board a ship bound to Boston, which was afterwards attached by a creditor in Boston, that the defendant must prevail, as there was no legal delivery before the attachment. That it was a case of two creditors, each endeavoring to secure his debt out of the same fund; he who first acquires possession will hold the goods."

In the case of *Hoffman et al. v. Joseph Noble and another*, 6 Met. 68, the court very properly held, that where a consignee had made an advance to the full value of the goods, in good faith, and they having come into his possession, he stood in the light of a purchaser.

It is supposed that a decision against the paramount lien of the plaintiff, as here asserted, may tend to prevent the customary advances on the shipment of produce. Factors

or commission merchants must be cautious to whom they make advances. The legal right of the bank growing out of the fraud, to the pork and flour, if asserted by an action of trover, is not disputed. And this shows that the case turns mainly upon a mere technicality. But on the other side, the rights of creditors are involved, and the assertion of those rights under the jurisdiction where the property is found. If by a small advance on a large amount of property, by a factor, a fraudulent purchaser may remove the property to a foreign jurisdiction, beyond the reach of his local creditors, frauds of the greatest magnitude may be practised. The facts of the present case strongly illustrate this, and show under such a rule with what facility and impunity such frauds may be committed.

This is probably the first case involving some of the precise questions, above considered. I have felt an uncommon solicitude on the subject, and took occasion, at the last term of the Supreme Court attended by my lamented brother Story, to consult him on the points ruled, and I was gratified to find that he coincided with the opinion as now expressed. Upon the whole, we direct a judgment of *de retorno habendo*.

CIRCUIT COURT OF THE UNITED STATES.

ILLINOIS—JUNE TERM, 1847.

WM. LEWIS *v.* ADMINISTRATORS OF BROADWELL.

The act of limitations of Illinois, of 1827, bars certain claims not prosecuted in sixteen years, but did not operate against non residents; but this exemption was repealed by the act of 1837—held that on a claim which had six years to run, the statute would operate.

To bar any claim, there must be a reasonable time for the statute to run after it is enacted.

Until administration granted, it is doubtful whether the statute can operate, as there is no one against whom suit could be brought.

A creditor may administer, but is he bound to do so?

Mr. Robbins for plaintiff.

Messrs. Logan & Lincoln for defendant.

OPINION OF THE COURT.

THIS is an action of covenant. The defendant pleads the statute of limitation, of the 10th of February, 1827, which limits the action, brought by the plaintiff, to sixteen years.

The plaintiff replies, that they are citizens of Ohio, and within the proviso of the seventh section, which declares, that non residents shall have sixteen years, within which to bring their action after coming within the state.

To this replication, the defendants demur.

By the act of the 11th of February, 1837, the above proviso, in favor of non residents, was repealed. And it is

contended, that, until the proviso was repealed by this act, the statute did not begin to run, and that, consequently, until the lapse of sixteen years from that time, there can be no bar to the demand of the plaintiff. That the removal of the disability must, in effect, be the same as where a non resident, against whom the statute does not run, comes within the state, from which time the statute begins to operate.

There is plausibility in this argument, but we suppose the repealing clause must place the demand of the plaintiff on the same ground as if the act of 1837 had contained the provision, in regard to limitations, that is contained in the act of 1827, omitting the proviso as to non residents. On this hypothesis, ten years of the statute had run, from the time the right of action accrued to the plaintiff, and the question would arise, whether the statute would bar at the end of sixteen years from the time the action accrued, or from the enactment of the statute, in 1837. We suppose the statute, from its passage, would operate upon the right of the plaintiff, and would constitute a bar in six years, as that would be the time the statute had to run.

This is the effect given to statutes of limitations on rights of action which had accrued before their passage. No court would give effect to a statute so as to bar claims for time elapsed before its passage; but where a reasonable time must elapse after the enactment, before the bar is complete, effect must be given to the statute.

The demurrer to the replication is sustained.

With the leave of the court, the plaintiff filed another replication, which alleged that, in 1836, the first administrator on the estate of Lewis died, in Illinois, and no other administration was granted until 1843, and that during that time there was no one against whom suit could be brought, &c. To which the defendant demurred.

In the case of *Murray, Administrator, v. The East India*

Company, 5 Barn & Ald. 204, "In an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due, there being no cause of action until there is a party capable of suing." In *Cary v. Stephenson*, Salk. 421, "An action of assumpsit, for money had and received, was brought against one who had received money belonging to the estate of the intestate, after his death, and before administration granted—the receipt being more than six years before the action, but the grant of the administration was within six years. The court held that the time of limitation did not begin to run until the grant of the administration." And, in the above case of *Murray*, Chief Justice Abbott said, "Now, independently of authority, we think it cannot be said, that a cause of action exists, unless there be also a person in existence capable of suing."

When administration was granted, in 1836, the act of 1827 did not operate against the plaintiff, he being a non resident; and, from the repeal of that exemption by the act of 1837, up to the time of granting letters the second time, in 1843, there was no person against whom the action could be brought. It is not shown that the deceased had any heirs in Illinois. The statute of Illinois authorises a creditor to administer, but is he bound to do so? A failure to sue infants, it is admitted, is no excuse under the statute.

On this point, Judge M'Lean suggested doubts whether the excuse of the plaintiff for not suing was not sufficient, and the district judge being of a different opinion, the question was certified to the Supreme Court, under the act of Congress.

COOK & MAXWELL v. LANSING.

Under the bankrupt law, all the interests and effects of a bankrupt may pass to his assignee, and suits should be brought in his name, or for the benefit of the creditors whom he represents.

To a suit in the name of the bankrupt the defendant may plead the bankruptcy, and the appointment of an assignee, in abatement.

Mr. Baker appeared for plaintiffs.

Messrs. Cole and Brown for defendants.

OPINION OF THE COURT.

THIS action is founded on a judgment obtained in the state of New York. The defendants pleaded that plaintiffs filed their petition in bankruptcy, that an assignee was appointed, that the above judgment was placed on the schedule as assets, and that the right having passed out of the plaintiffs to the assignee, the suit should have been brought in his name. To this plea a demurrer was filed.

Under the bankrupt law, the entire property and interests of the bankrupt was vested in the assignee. Provision was made for the prosecution of suits then pending; but all suits commenced after the appointment of the assignee, should be brought in his name, or at least prosecuted for the benefit of the creditors, whom he represents. And as this suit has not been brought in either of these forms, but by the bankrupts, the demurrer to the plea is overruled.

THE UNITED STATES v. H. H. GEAR.

A permit to enter on lands containing lead ore, may be shown in an action of trespass by the United States, not as a justification, but to show the nature and object of the entry.

A final receipt by an officer of the government, authorised to act in the premises,

The United States v. H. H. Gear.

for rent, is a full discharge, being subsequent to the trespass alleged, although the officer may never have accounted for the money received.

Mr. Gregg, district attorney, for plaintiffs.

Messrs. Hardin and Campbell for defendant.

OPINION OF THE COURT.

THIS action was brought by the United States, for a trespass upon certain lands containing lead ore. The defendant pleaded the general issue and notice, &c.

It was proved that defendant being in possession of certain mineral lands, had dug of lead ore about one hundred thousand pounds, which contained from sixty to seventy per cent. of pure lead. The mineral was worth from fifteen to eighteen dollars per thousand pounds.

The defendant offered in evidence a permit from an authorised officer of the government to enter upon the land, which was objected to, but the court admitted it as evidence, as it explained the nature and object of his entry, and showed that it was not tortious. He also offered in evidence a receipt of John Flannigan, agent for the lead mines, for four hundred dollars, in full for rent of lead mines, dated in 1841, subsequent to the trespass laid in the declaration.

This receipt was objected to on the ground, that the agent had never accounted for the money, but the court admitted it as evidence, and instructed the jury that unless there was fraud in obtaining the receipt, or a mistake, of which there was no evidence, that it was a full discharge. That the money having been paid by the defendant to the authorised agent of the government, the payment was good, though the agent may never have accounted for it. Verdict, not guilty.

CIRCUIT COURT OF THE UNITED STATES.

MICHIGAN—JUNE TERM, 1845.

UNITED STATES v. HENRY W. CONNER.

A bankrupt having submitted the facts in regard to his property fairly to the advice of his counsel, and in acting under the advice thus given withholds certain items from his schedule, is not guilty of perjury.

The fraudulent intent is wanting, which is an essential ingredient of the crime.

A criminal intent is necessary to constitute this offence.

The circuit courts of the United States may, on cause shown, grant new trials in criminal cases.

Mr. Bates, district attorney.

OPINION OF THE COURT.

THE defendant was indicted for perjury under the bankrupt law, and was found guilty by the jury at the last term, the presiding judge being absent.

The indictment contained but one count, charging the defendant with having furnished a false inventory of his property, in not including his interest in a house and lot, his interest in a grocery store, and in certain choses in action.

The verdict was general, and a motion being made at the last term for a new trial, it was continued to the present term.

This motion is opposed on the ground that the circuit courts of the United States have no power to grant new

trials, in any case of felony; that the common law must be their guide, and that, at common law, no new trial in a criminal case can be granted, except in cases of misdemeanor.

This question was considered and decided in the *United States v. Keen*, 1 M'Lean, 429, and it will not be again examined. There can be no doubt that the court may, on cause shown, grant a new trial in any criminal case.

The principal ground relied on for a new trial is, the charge to the jury on the fact proved, that the schedule being made out on the advice of a lawyer, a full statement of the facts being submitted to him, did not exempt the defendant, if any property was withheld from his schedule, from the charge of perjury.

The maxim is admitted, that ignorance of the law constitutes no excuse for the commission of a crime. But the intention with which the act is done must give a character to the act. A man may innocently commit homicide. If, in doing a lawful act, he should unintentionally kill a fellow creature, he is in no sense guilty of a crime. A bankrupt is bound to exhibit a true schedule of all his property, and if he fail to do this, wilfully and fraudulently, he is guilty of perjury. But if he, being unacquainted with the requirements of the law, shall be advised by his counsel, after the facts have been fully stated to him, that certain items of property are not required to be stated on his schedule, and he omits them, he is not guilty of perjury. He acts fairly in submitting the facts to his counsel, and, by acting under his advice, he shows a desire to conform to the law.

To constitute perjury under the law, the false schedule must have been made corruptly, by the bankrupt, and with the intent to defraud his creditors. The falsity of the schedule being established, the mitigating circumstances must be shown by the defendant; and if no excuse be proved,

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the fraudulent intent will be inferred from the act, it being, *prima facie*, in violation of the law.

A new trial being granted, a *nolle prosequi* was entered.

RUE & WOOD v. DECKER ET AL.

Under the decisions of the Supreme Court, land must be sold on execution, under the law in force at the time the contract was entered into.

Mr. *Vandyke* for complainants.

Mr. *Barstow* for defendants.

OPINION OF THE COURT.

THIS is a bill to foreclose a mortgage, dated fifteen days after the statute of Michigan took effect, which requires a valuation of real estate when sold on execution, and that it shall sell for at least two thirds of its appraised value.

It is insisted that, as the valuation law of 1842 had not been adopted by the court, the mortgaged premises must be sold without valuation.

In the case of *M'Cracken v. Hayward*, 2 Howard, 813, speaking of the laws of Illinois regulating the sale of real property on execution, the court say, "The obligation of the contract between the parties in this case, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit, and obtain a judgment, to take out and prosecute an execution against the defendant, till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws, giving these rights, were as perfectly binding on the defendant, and as much a part of the contract, as if

Browning v. Andrews.

they had been set forth in its stipulations, in the very words of the law relating to judgments and executions." According to this, the execution laws of Michigan became a part of the contract, and, consequently, they cannot be changed so as to impair the obligations of the contract.

How this doctrine can be carried out, where suit is brought on the contract in a state where it was not made, is beyond my comprehension. It would require land to be sold in Michigan under the laws of Ohio. There is no escaping from this result. And yet this decision stands as the law to govern state, as well as federal, courts. Effect may be given to the decision in the case under consideration. As the contract was made under the act of 1842, the sale must be regulated by it.

BROWNING v. ANDREWS.

When a note is deposited with a bank for collection, when due, it is a sufficient demand if the teller of the bank, presenting the note, inquires of the book-keeper whether a deposit has been made to pay the note, and is informed that there are no funds to pay it.

The demand is good though the teller acted as clerk of the notary public who protested the note.

The teller represented the bank, and it was responsible for the money if paid.

The notice was made out by the clerk, but signed by the notary, and the court will not presume a fact, not proved, against the face of the paper.

Messrs. Joy & Porter for plaintiff.

Mr. Hand for defendant.

OPINION OF THE COURT.

This is a motion for a new trial. The plaintiff brought this action against the defendant as indorser of a promis-

sory note, payable at the Bank of Michigan. At the trial the defendant objected to the evidence of the presentment of the note to the bank, and demand of payment when it became due; and also as to the sufficiency of the notice. The objections were overruled and the evidence was permitted to go to the jury, with a reservation of the questions of law.

1. The note was presented to the bank and a demand of payment made, by the clerk of the notary, who, it is alleged had no authority to make the demand.

This point was raised in *Sacridier v. Brown*, 3 M'Lean, 481, but it was not decided, as the decision turned upon the illegality of the protest.

In that case the court referred to *Lofely v. Mills*, 4 Term, 175, to the views of Mr. Chitty and his correspondence with the associations of notaries of Liverpool and London on the subject, and to the 3d & 4th of Hill's reports, and the court say, "if it were admitted that a notary's clerk may make a demand of payment, yet it is very clear that the clerk cannot make the protest."

From the evidence in this case it appears the note was deposited in the bank for collection, that Alexander H. Sibley, the teller of the bank, was the clerk of the notary, and when the note became due he inquired of the book-keeper whether any funds had been deposited to meet the note, who replied, after examining the books, that no such deposit had been made. The teller at the time held the note in his hands, presenting it to the book-keeper. We think this was a sufficient demand. The bank had possession of the note for collection and was responsible for it. The note was payable at the bank, and it was the duty of the maker to deposit funds for that purpose. No deposit was made, and this fact being ascertained by the book-keeper, who enters all deposits, at the request of the holder of the note, nothing more was necessary. Had the funds been placed

in the bank the possession of the note by the bank would have authorised the teller to deposit them to the credit of the plaintiff.

In the *Bank of Utica v. Smith*, 19 John. 231, the court decided, "that a demand of payment of a note by a notary, or a person having a parol authority for that purpose, or the lawful possession of the note, is sufficient." The note, on payment, would have been surrendered, and wherever this may be lawfully done by the holder, he may make the demand.

2. It is insisted that the notice was insufficient.

In support of this objection a late decision of the Supreme Court of Michigan is referred to, as governing the question of notice.

The notice was directed to the defendant informing him, that the note of John H. Gatts for \$428 87 indorsed by the defendant and payable at the Bank of Michigan, was protested for non payment on the 9th of July, 1838, and that the holders look to him for payment. The form of this notice seems to have been taken from the one sanctioned by the supreme court in the case of *Mills v. The Bank of the United States*, 11 Wheat. 431. "The law has prescribed no particular form of such notice. The object of it is merely to inform the indorser of the non payment by the maker, and that he is held liable for the payment thereof." *Bank of Alexandria v. Swann*, 9 Peters' 33. "The notice is sufficient if it state the non payment: and it is not necessary to state expressly, for it is justly implied, that the holders look to the indorser." 3 Kent's Com. 2d ed, 108; *Lenox v. Leverett*, 10 Mass. Rep. 1. *Wallace v. Agry*, 4 Mason 336; *Kenworthy v. Hopkins*, 1 John. Cases, 107.

The late decision in Michigan, not yet reported, is understood to overrule the above cases and what has, heretofore, been considered the settled law upon the subject in this country and in England. Whether this be the case or not

can be of but little importance to this court. The question is not local and does not arise under any statutory provision. Notice is required by the statute, but the form of the notice is not given. Indeed, had a form been adopted by statute, essentially changing the form which has been observed here and in England for more than half a century, and which has been sanctioned by courts that recognise the law Merchant, we should hesitate to give the statute a retrospective effect. It would seem vitally to bear upon prior contracts, in changing the nature of their obligation.

The courts of the United States follow the settled construction of the statutes of a state, by its supreme court. But the above is a question of general commercial law, and does not depend upon the construction of a statute. The reason which influences the supreme court to follow the states in the construction of their statutes, it would seem, should influence the state courts to follow the rule of decision of the Supreme Court of the Union on questions of general law.

The notice purports to have been signed by Henry R. Sanger, notary public, and the body of it is in the hand writing of Sibley, the teller of the bank. It seems to have been the practice of the notary to leave blank notices signed by him with Sibley, who filled them up and gave them the proper directions, but the witness is not able to state whether, in this case, the name of the notary was signed to the notice before or after it was filled up. As the signature of the notary is proved to be genuine, the court will not presume a fact, nor should a jury be authorised to do so, against the face of the paper.

The motion for a new trial is overruled, and judgment.

LYELL v. THE BOARD OF SUPERVISORS OF ST. CLAIR COUNTY.

A county is made subject to a suit by an act of the state.

At common law a county was not liable to a suit.

On a judgment being obtained against the county, the supervisors are required to levy the amount on the people of the county.

And if they shall fail to do this, a mandamus may be issued to compel them.

This is a common law remedy, but the object of this bill is to subject certain bonds and mortgages to the satisfaction of the judgments which cannot be reached by mandamus.

The remedy at law, therefore, is not adequate.

A creditor's bill may be filed against a county,

No objection is perceived why an execution may not be levied on the property of a county.

Messrs. *Lee, Stuart and Joy* for complainants.

Mr. *Terry* for defendants.

OPINION OF THE COURT.

THIS is a suit in chancery, and is brought by the complainant to subject certain bonds, mortgages and other assets, under the control of the defendants, to the payment of two judgments at law recovered against them. Executions were issued on the judgments, which were returned *nulla bona*. The defendant demurred to the bill.

In the Revised Acts of Michigan of 1846, page 65, it is provided in the twenty-sixth section, that "whenever any controversy or cause of action shall exist between any of the counties of this state, and between any county and an individual or individuals, such proceedings shall be had either in law or equity, for the purpose of trying and finally settling such controversy, and the same shall be conducted in like manner, and the judgment or decree therein shall have the like effect, as in other suits or proceedings between individuals and corporations." The next section provides,

that a suit against a county shall be in the name of "the board of supervisors of the county."

At common law a county could not be sued, 2 Term Rep. 667; 7 Mass. Rep. 187; 2 Sergeant & Rawle, 371.

The thirty-third section provides, that "when a judgment shall be recovered, the board of supervisors shall levy and collect the amount as other county charges."

Under this provision it is insisted that the remedy was by mandamus, and not by a bill in chancery.

There can be no doubt that a mandamus may be issued to compel, under certain circumstances, a public officer to do his duty. *Smith v. Commissioners of Portage County*, 9 Ohio, 25; *Attorney General v. The Utica Insurance Company*, 2 John. Ch. 371; *Johnson v. The Supervisors of Herkimer County*, 19 John. Rep. 272.

The grounds of the present bill are to subject, in payment of the judgments, certain bonds, mortgages, &c., held by the county, and which cannot be reached by a mandamus. It is made the duty of the supervisors to levy on the county the amount of the judgment, and this duty may be enforced by a mandamus, but that is not the object of the present bill. It is a creditor's bill, which is authorised and regulated by the statutes of Michigan, and under which this court give relief. Suits against counties are placed on the same footing, as against individuals, by the statute, so that it would seem a creditor's bill may be filed against the supervisors of a county. The objection that a *fiery facias* cannot be issued against a county is technical, and is by no means conclusive of the objection founded upon it. The statute which regulates a creditor's bill, requires a *fiery facias* to be returned *nulla bona* before the bill is filed. In other words, this evidence of the inadequacy of a remedy at law is required. But this has been done in the present case, and the objection is, that the writ could not be issued against a county. This is not admitted. A judgment

Bryce v. Dorr & Jones.

having been legally obtained, it is not perceived why the property of the county may not be levied on. The power given to the supervisors to levy the amount by a tax on the county, is cumulative, and does not necessarily prohibit the ordinary course of the execution, as in case of an individual.

In Massachusetts the doctrine is established, that on a judgment against a county or town, the property of any citizen may be taken in satisfaction. 6 Metcalf, 552. But this doctrine is not sustainable in this state. The imposition of a tax by the supervisors, they being subject to a mandamus, is a more reasonable and just mode.

The county being made subject to a suit, no serious objection is perceived, against reaching the rights in question by the ordinary exercise of chancery powers, independently of statutory provisions.

The demurrer is overruled.

BRYCE v. DORR & JONES.

A patent right is infringed, by making the thing patented, though employed by another to do so.

But where the thing was made without the knowledge of its having been patented, more than nominal damages should not be given.

Mr. *Douglass* for plaintiff.

Messrs. *Joy & Porter* for defendants.

OPINION OF THE COURT.

THIS action is brought for the violation of a patent right, by the defendants, in casting at their foundry water wheels for mills.

It was proved that several wheels were cast on the same principle of the plaintiff's patent. The model was furnished by Sage. Only two wheels were cast after the defendants came to the knowledge of the plaintiff's patent.

As the defendants were employed by Sage to cast the wheels, it was insisted that the action should have been brought against him, and was not maintainable against the defendants. But the court held the defendants were liable for an infringement of the patent. But, as the defendants had *cast but a few wheels*, and with the exception of two of them, had acted without a knowledge of the plaintiff's right, they suggested to the jury that nominal damages were all that the plaintiff could demand. Nominal damages were found.

HILL v. NORVELL & CRARY.

A notice of taking a deposition being left at the lodgings of a defendant, without specifying the lodgings, is not sufficient, where the defendant swears he did not receive the notice.

A note payable without grace, in three months or any other specified time, is not due until the time shall expire; excluding the day the note is dated.

The usage of the banks in the District of Columbia, to make a demand on the fourth day of grace, only applies to notes negotiated by the bank.

Notes left for collection in the bank, are due on the third day of grace under the general commercial usage.

A notice to an indorser, who is a member of the Senate or House of Representatives of the United States, left in the post-office of the Senate or House, Congress being then in session, is not a sufficient service.

If, however, the jury shall believe that the notice was duly received, it is sufficient.

Mr. Backus for plaintiff.

Messrs. Bates and Romeyn for defendants.

OPINION OF THE COURT.

IN this action the defendants are charged as indorsers on a note for three thousand six hundred dollars to the plaintiff, dated the 16th March, 1839, payable in nine months.

A deposition was offered which was objected to for want of notice. The person who served the notice, swore that he left it at the lodgings of Norvell, the defendant, in Washington City, the 28th of March, 1845. Mr. Norvell filed an affidavit that he remained in Washington City, at Fuller's, his place of lodging, on the above day until half after five o'clock, when he left for Baltimore. That just before he left he inquired of the bar-keeper at Fuller's, whether any communication directed to him had been received at the house, and was answered in the negative. The court held the proof of notice insufficient, as it did not specify where the copy was left. The lodgings of defendant must have been ascertained by the information of others.

The notary who demanded and protested the note, states in his deposition, that he made the demand of payment on the 19th of December, 1839; and that on the next day he deposited notice thereof in the post-office of the Senate, Mr. Norvell being a member of the Senate, which was then in session at Washington; and another notice in the post-office of the House of Representatives, which was also in session, to Crary, the other indorser, who was a member of the House.

It is objected that the demand was made prematurely. If this be so, it is fatal to the right of the plaintiff. A demand must be made of the maker when the note becomes due, and if made either before or after that time, the indorsers are discharged. In Story on Bills, pages 378-9, it is laid down "that the universal rule of the commercial world now deems a month, in all cases of negotiable in-

struments, to be a calendar month. A bill, therefore, due the 1st of January, payable in ten days, without grace, becomes due on the 11th of the same month, excluding from the computation the day of the date of the bill." And in page 380, he says, "a bill payable six months after date if payable without grace, becomes due on the corresponding day of the sixth month, excluding the day of the date of the bill, whatever number of days the months contain."

The above applies to notes without grace, but the days of grace are established and controlled by usage. They differ at different places, and bind parties who come within their operation. In *Mills v. The Bank of the United States*, 11 Wheat. 430, the court held, "when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not."

The case of *Renner v. The Bank of Columbia*, 9 Wheat. 581, is cited, where the court say, "by the custom of the banks in the District of Columbia, payment of a promissory note is to be demanded on the fourth day after the time limited for the payment thereof." This was the usage of the banks in the District at that time.

As the note in question was dated the 16th of March, 1839, payable in nine months, it is insisted that the note without grace, was not due until the 17th of December ensuing; and adding four days of grace, that it was not due until the 20th of December, at which time the demand should have been made. That the demand having been made on the 19th of December, cannot charge the indorsers.

In the case of *Cookendorfer v. Preston*, 4 Howard, 326, it appears that the usage of the banks in Washington and Georgetown was changed, so as to make the demand on all notes left for collection, on the third day of grace, conformable to the general commercial usage. As the demand of

payment on the note before us was made on the third day, it was within the present usage, it not having been negotiated by the Bank of the Metropolis, although it was made payable there, and was deposited for collection.

The important question is, whether leaving the notices in the post-offices specified, was a sufficient service of them. The court instructed the jury that leaving a notice in the post-office of the place where the indorser resides, is not a good service. That it must be delivered personally to the indorser, left at his place of business or dwelling. That the indorsers in this case being members of Congress, were residents of the city of Washington for the time being. And that leaving the notices at the post-offices of the Houses to which they respectively belonged, was not a service within the rule. That in principle there could be no difference between the post-offices of the two Houses, and the post-office of the city. Some evidence was given conducing to show an admission by one or both of the defendants, that they had received the notices, and to show the manner in which letters left in the post-offices of the two Houses, were distributed to the members after the adjournment. And the jury were instructed, that if they should find the notices were received by the defendants the day after the protest was made, they should find for the plaintiff; but if they should not so find, their verdict would be for the defendants. The jury found for the defendants.

CIRCUIT COURT OF THE UNITED STATES.

OHIO—JULY TERM, 1845.

M'LEAN, Assignee of Mahard, v. THE LAFAYETTE BANK ET AL.

[This opinion was given in 1846.]

In bankruptcy, the Circuit Court will exercise jurisdiction over distinct interests and parties, on allegations of fraud, in order to adjust liens and make distribution of assets.

The assignee of the bankrupt may take advantage in behalf of creditors, of any preference or other acts by the bankrupt, in violation of the bankrupt law.

The books and schedules of the bankrupt are evidence under this head.

The taking of a mortgage by a bank from its debtor, does not show that the bank considered him to be insolvent, nor that the mortgagor contemplated bankruptcy.

The second section of the bankrupt act does not render void a contract or conveyance made two months before the bankruptcy, whatever may have been the intention of the bankrupt, if the other party acted fairly and had no notice of his intention.

The party impeaching a contract, on the ground of fraud, must prove the fraud.

A contemplation of bankruptcy means—in contemplation of a state of bankruptcy.

This means more than an inability to pay debts promptly,

It means a thorough breaking up of his business by the bankrupt.

The charter of the Franklin Bank, which authorises it to discount notes, &c., on banking principles, does not make void a contract or note, reserving more than six per cent. interest.

The words, “ principles and usages of banking,” mean the right to receive interest in advance.

The general law regulating interest applies to the Franklin Bank.

The purchase of a bill, at any price, is not usurious. The statute gives, on the loan of money, “ six per cent. per annum, and no more,”

A bill purchased, must be complete, so as to enable the purchaser to bring suit on it.

A bill not accepted is not of this character.

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When paper is the basis of exchange, it may be shown as influencing the rate of exchange.

The rate of exchange is a fact to be established by evidence, like any other fact.

If the rate of exchange charged be only colorable, it is usurious.

The court will not presume that a combination existed to increase the rate of exchange.

Such a charge must be proved by the clearest evidence.

A discount of a bill, on which exchange is charged to take up a prior bill, is not usurious, unless it be shown that such an agreement was made at the discount of the first bill.

A prior mortgagee has a right to release his claim on the payment of his debt, unless he have actual notice of the claims of subsequent mortgagees.

The lien of a satisfied judgment cannot be revived in favor of one of the defendants, who was surety, to the prejudice of third parties.

A surety, having paid the debt, has a right to all the collaterals held by his principal, but cannot claim the assignment of the instrument which is evidence of the debt against the principal and himself.

By giving collateral security to the Franklin Bank, by its debtor, the charter lien is discharged.

A judgment lien is good under the bankrupt law, and, being prior to a mortgage, must be first satisfied.

The charter of the Lafayette Bank provides, that it shall not take more than six per centum per annum, in advance, on its loans or discounts.

This provision is similar to the one in the Bank of Chillicothe, and to the general act regulating interest.

The rule of construction should be the same, on words of the same import, whether found in the charter of a bank, or in the general law.

On general principles, a contract made against law, or in violation of the policy of the law, is void.

The law in Ohio is settled, that usury voids the contract only for the excess.

If the bills were void, and the mortgages, the money actually paid by the bank could be recovered.

But the bills were not usurious. The regular interest only was paid in advance, and the established rate of exchange was charged for bills.

Stock transferred to the bank as collateral security, for the time, extinguishes the charter lien.

A note being renewed, omitting one of the indorsers, he is not liable, and can claim no lien as such.

A co-security may claim that property, given to indemnify the other surety, may be sold for the benefit of both.

But this cannot be done where the other surety is discharged by the payment of the debt.

Where parties, not within the jurisdiction of the court, appear voluntarily, the court can take jurisdiction.

Where a mortgage is given on personal property, which remains in the possession and under the control of the mortgagor, and he sells the property, in part, in payment of other debts, &c., the mortgage must be considered fraudulent and void.

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A concealment of a mortgage, by fraudulent representations, to the injury of third parties, is void.

A mortgage to indemnify, may be subjected to the rights of the creditor, though the mortgagee may not have paid the debt.

Where a lien is common to two or more creditors, and one of the creditors has a lien on a separate property, equity will require the separate lien to be enforced first.

A contract made within the two months previous to the filing of a petition by a bankrupt, does not stand as if made prior to that time.

Such a contract is *prima facie* fraudulent—or, at least, it must be shown to be *bona fide*.

A judgment confessed within the two months before filing the petition, where the bankrupts had broken up their business, &c., is fraudulent, and also the proceedings under it.

Messrs. *Wright, Fox, Miner, Corry, Russel and Corwin*, appeared for complainants.

Messrs. *Groesback, Chase, King and Anderson*, for the defendants.

OPINION OF THE COURT.

In this bill the complainant prays, that the property of Mahard, real and personal, may be brought into the bankrupt court for distribution, and that the various liens under which the defendants claim may be set aside and annulled as fraudulent under the bankrupt and state laws. An injunction was granted to stay proceedings in the state courts on the mortgages and other liens set up by the defendants. The case in all its branches has been argued with much research and distinguished ability. As many of the defendants assert distinct interests, which are in no respect connected, a demurrer on that ground was filed to the bill. At a former term this demurrer was overruled, and the jurisdiction of the court sustained. Since then, the case of *ex parte Christy*, 3 Howard, 308, has been decided, which maintains the ground assumed by this court.

In February, 1837, John Mahard, sen., and John Mahard, jun., having been co-partners in a commercial business in Cincinnati, dissolved; and a new co-partnership was formed

between John Mahard, jun., and William Mahard. The same persons constituted a partnership in New Orleans. On the 27th of May, 1842, John Mahard, jun., filed his petition under the bankrupt law, and on the 20th of July ensuing, obtained a decree of bankruptcy. William Mahard on the 12th of August following, petitioned for the benefit of the act, and, in a due course of proceeding, was declared a bankrupt.

The Cincinnati firm exhibited an amount of debts exceeding one hundred and seven thousand dollars, whilst its assets were little more than the sum of five thousand dollars. The firm at New Orleans seems to have owed, independently of its indorsements, about the sum of thirty-eight thousand dollars; and it returned nominal assets to nearly the same amount. In the list of debts are included the sums due to the defendants, and a statement of the mortgages given to them. There is no suggestion that the schedules filed in the bankrupt court do not contain a correct statement of the condition of the respective firms.

The mortgage to the Franklin Bank of Cincinnati will be first considered. This instrument is dated the 3d of April, 1841, and was recorded the 18th of October ensuing. It was given on in-lots 404 and 460, in Cincinnati, by John Mahard, jun., to secure the payment of about the sum of sixteen thousand dollars; for which he was then responsible to the bank, and "all other liabilities to the bank which he might afterwards incur." This mortgage was signed and acknowledged before the bankrupt law was passed, but, under the Ohio statute, it did not take effect until it was recorded, which was subsequent to the passage of the bankrupt act. That act did not go into operation until the 1st of February, 1842.

The validity of this instrument is objected to on several grounds.

1. That it was intended to give a preference to the

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Franklin Bank over other creditors, the firm being at the time insolvent.

2. That it is void, as it was designed to secure debts which the bank had no power to contract.

3. That the debts secured by it were usurious.

To show that both firms commenced business without capital, and rested entirely upon credit, through the whole course of their business, in the concluding argument the books of the partnerships were referred to, and other evidence in the case. John Mahard, jun., is a witness, and swears that until about the time of filing his petition, he considered himself solvent; and that the firm at Cincinnati were able to go on with their business. The books and the schedules are evidence, if for no other purpose than to lessen the weight of this statement. But they are clearly admissible on general principles, as facts which may conduce to invalidate liens created to benefit certain creditors to the prejudice of others. In this respect the assignee represents the creditors, and may take advantage of a preference and fraud which the bankrupt could not do.

By the fifth section of the act of Ohio, of the 11th February, 1832, a fraudulent transfer of property to defeat creditors is made a penal offence. And by the third section of the act of the 14th March, 1838, it is declared that "all assignments of property in trust, which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors to the exclusion of others, shall be held to enure to the benefit of all the creditors in proportion to their respective demands."

The assets of both firms may be considered nominal at the time of their failure; and from their books it would seem that the partnership business was carried on mainly, if not exclusively, by discounts and the sale of bills. The property mortgaged was owned by John Mahard, jun. It may be that funds from the proceeds of the partnership

were used in the purchase of a part of this property. Of this, however, there is no positive evidence.

The fact of taking this mortgage, it is insisted, goes to show that the Franklin Bank doubted the solvency of the Mahards. Such security to banks is not unusual, and although it may show on the part of the bank a desire for a higher security than that of an indorsement, yet it does not prove that the borrower is considered insolvent. Mahard may have executed the mortgage in preference to giving an additional indorser. At the date of this mortgage the credit of the Mahards seems to have stood fair. No facts have been proved in the case, which conduce to establish the fact, that at that time they contemplated bankruptcy, or a state of insolvency, within the bankrupt or state law. Much less is there any evidence that the bank, in taking the mortgage, acted under a knowledge that a state of bankruptcy or insolvency was contemplated by the mortgagor. A rigid scrutiny into the affairs of the firms, so as to ascertain the amount of their capital by their creditors, is not to be presumed. They did a large and, apparently, a prosperous business in the winter of 1840 and 1841. And it was not until the 2d of August, 1841, that any one of their notes was protested. Subsequent to this period, their bills were occasionally protested, sometimes for non-acceptance, and at others for non-payment. In the summer of this year, Mr. Groesbeck, the president of the Franklin Bank, refused to increase Mahards' indebtedment.

In this part of the case, it may be proper to give a construction to the second section of the bankrupt act, which, it is contended, vitiates all the liens set up by the defendants. That section provides, "That all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, any preference or priority

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over the general creditors of such bankrupt; and all other payments, &c., in contemplation of bankruptcy, to any person or persons whatever, not being a *bona fide* creditor or purchaser, for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act.” “Provided, that all dealings and transactions, by and with any bankrupt, *bona fide* made and entered into more than two months before the petition filed against him or by him, shall not be invalidated by this act: Provided, that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act.” Then follows the clause, “If it shall appear to the court that the voluntary bankrupt, since the 1st of January, 1841, “or at any other time, in contemplation of the passage of a bankrupt law, by assignment or otherwise, has given a preference to one creditor over another, he shall not receive a discharge unless a majority of his creditors shall consent thereto.” And by another proviso, in the same section, liens valid under the state law are not to be affected by the act, if not inconsistent with its provisions.

This section has given rise to much controversy, and the courts have not altogether concurred in its construction. It has not been construed by the Supreme Court. Where, in contemplation of bankruptcy, and to give a preference to one creditor over another, a payment or transfer of property is made, it is void under the first part of the section. But, by the first and second provisos, all *bona fide* transactions, more than two months before the petition was filed, and where the other party had no knowledge of an act of bankruptcy, or notice of an intention by the bankrupt to take the benefit of the act, are not invalidated by the act. From this it is clear, that before the two months a creditor or purchaser, acting *bona fide*, and without knowledge that the bankrupt had committed an act of bankruptcy, or intended

to apply for the benefit of the act, might, in every respect, make as valid contracts with him as with any other citizen. And where a contract is impeached under these provisos, the party impeaching it must show that it was not made *bona fide*. A fraud at common law, or under this act before the two months, is not presumed. The above refers to the good faith of the purchaser or creditor, without regard to the motives of the bankrupt. He may have committed an act of bankruptcy, or intended to apply for the benefit of the act, and, consequently, acted in bad faith; still the contract is valid, if the other party has acted in good faith, and without the knowledge or notice specified.

But the important inquiry remains to be answered, what shall amount to a "contemplation of bankruptcy," and a preference of a creditor, within the section.

It would seem, from some of the arguments in this case, that nothing short of an avowal of an intention to take the benefit of the act and to give a preference, is within this section. This is clearly wrong. The courts, or juries under the instructions of the courts, must determine in this, as in other cases of fraud. This, being a fraud under the act, may not possess that turpitude which attaches to a fraud at common law. It may, indeed, separated from the statute, have the appearance of a just, if not a meritorious act; but whether it violate the statute, must be ascertained as in a common fraud. We may give a definition of fraud, but no court or jurist can lay down an unvarying rule, applicable to all cases, by which an act shall be held fraudulent. The character of the act, not unfrequently, depends upon the intention with which it was done. And we can only judge of the intention from the act and its attending circumstances. These are as diversified as human transactions.

It is contended that the words, "in contemplation of bankruptcy," must be construed to mean, an "intention to take the benefit of the bankrupt law." An individual may

be reduced to a state of bankruptcy, and yet, from pride, or other motives, not intend to take the benefit of the law. Now, if the construction contended for be correct, such an individual might, in contemplation of a state of bankruptcy, prefer certain creditors to others, without any violation of the act. This would defeat the great object of the law, which was, to secure to creditors a *pro rata* distribution of the estate of the bankrupt. A construction which leads to this, requires no further comment. The term bankrupt, as used in the act, has no technical significance which sustains this view. "In contemplation of bankruptcy," means, in contemplation of a state of bankruptcy. Had Congress meant more than this, they would have said so. Had an intention to take the benefit of the act been the thing "contemplated," it would have been expressed in appropriate terms. But such a provision would not have reached the evil to be remedied. A state of bankruptcy reaches the evil, and the above provisions of the act give a remedy.

A state of bankruptcy, or insolvency, means more than a mere inability to pay debts promptly. Such are the vicissitudes of trade, that but few of our enterprising merchants have not, at different periods in their course of business, been in this predicament. They were, perhaps, unable to meet the demands against them under any reasonable indulgence, had they closed their concerns. But their credit was good; they met promptly the current demands against them, and soon retrieved their affairs. A bankruptcy within the law, not only presupposes an inability to pay debts, but to continue in business. The preference of one creditor over another, implies an inability to pay both, and a determination to prefer one to the other.

If, at the time Mahard executed this mortgage to the Franklin Bank, on a strict account of the partnership funds, they had been found inadequate to meet the partnership debts, it would not follow that the firms were insolvent.

The private property of John Mahard, jun., was liable, and this, being of large amount, gave credit to the partnerships. That the Mahards, at this time, did not contemplate closing their business is clear, as they continued it through the summer and fall of 1841. In October of that year, their embarrassments became so great as to induce them to apply to the "Lafayette Bank" for relief, to enable them to carry on their business. Whether this application was made known to the Franklin Bank does not appear. Why this mortgage was withheld from record, from the 3d of April, the day of its date, to the 18th of October, is not shown. This circumstance is not proved to be so connected with other facts as to authorise an unfavorable presumption against the bank. On a full consideration of the facts and circumstances connected with the execution and recording of this mortgage, it cannot be held void under the second section of the bankrupt act, nor does it come within the state law above cited.

Under the second head, it is argued, that this mortgage is void, as it was given to secure a debt which the bank had no power to contract.

In support of this position, it is alleged, that the charter of the Franklin Bank prohibits it from taking more than six per cent. interest, and that a larger amount than that was received on the loans made to the Mahards, which, consequently, makes void the contract. In the case of the *Bank of Chillicothe v. Swayne et al.*, 8 Ohio, 254, the court held, that a bill of exchange which the bank had discounted at a greater rate of interest than six per cent. per annum was void, under a provision in its charter, that it should "not take more than at the rate of six per cent. per annum on its loans or discounts." The same principle has been sanctioned by the same court in subsequent cases.

Before these cases are more particularly referred to, it may be proper to examine the charter of the Franklin Bank,

to see if it contains a prohibition which will bring it within the principle of the above cases. It is admitted that, in terms, no prohibition against taking more than six per cent. interest is in the charter, but is supposed to be contained in the following words. "And it shall be lawful for said bank to loan money, buy, sell, and negotiate bills of exchange, checks, and promissory notes, and to discount upon banking principles and usages, bills of exchange, post notes, promissory notes, and other negotiable paper or obligations for the payment of a sum of money certain."

The power to "discount upon banking principles and usages," it is contended, imposes upon the bank a prohibition against receiving on its loans and discounts more than at the rate of six per cent. per annum. And this prohibition, thus brought into the charter, is to make void any contract made by the bank in violation of it. It, therefore, must be made to operate as a penalty. Now, that penal laws must be construed strictly, is a rule from which, it is believed, no court has departed; and yet, without such departure, it would seem the above prohibition cannot be made to operate in this charter.

What is the plain and obvious meaning of the words, "principles and usages of banking?" It is, that the bank may take, on loans and discounts, the interest in advance. Many bank charters give this power specially. Without it, courts have held that taking the interest in advance is usurious. And strictly, this is so. But other courts have decided, that they would regard the usages of banks so far as to legalise this practice, though the charters may contain no provision on the subject. That this was the main object of the above provision, there would seem to be no doubt. If it include the prohibition contended for, because such prohibition may be found in other charters, it must equally include all other provisions in these charters, which are not found in the Franklin Bank charter. This would be a new

rule for construing a contract. And especially would it be a new mode of introducing a prohibition into a charter. There can be no doubt, that the general law regulating interest applies to the Franklin Bank.

This leads us to the question of usury, which is the third objection made to this mortgage. This objection equally applies to the mortgages taken by the Lafayette Bank, and as the facts which bear upon this point apply, substantially, to both banks, the objection will be now considered.

John & William Mahard, of the Cincinnati firm, were in the practice of drawing bills, at four months, on Mahard & Brother, of the New Orleans firm. The same persons, it will be observed, composed both firms. These bills were discounted by the banks, and, in addition to the rate of six per centum interest, per annum, was charged, from one to two per cent., for exchange; and on one or two occasions, three per cent. Several witnesses proved, that the rates of exchange thus charged were regulated principally by the banks who discounted the bills, and brokers and grocers, who, to a limited extent, were in the practice of purchasing such bills. It was proved that sight bills drawn on New Orleans, at Cincinnati, with the exception of the months of March and April, in the year 1842, commanded, uniformly, a premium. This exception arose from peculiar causes, and, being subsequent to the transactions before us, does not affect the question now under consideration. On time bills on New Orleans, exchange was charged at the rate of about a half per cent. per month for the time the bill had to run.

The act fixing the rate of interest declares, "that all creditors shall be entitled to receive interest on all money, after the same shall become due, &c., at the rate of six per cent. per annum, and no more."

A question is made, whether the banks did not purchase these bills. A purchase of a bill, at any price, is not usu-

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rious. It may be bought in the market, like a commodity, as the parties shall agree. But a bill to be thus sold must be complete. It must be in such a state as to enable the holder to bring suit on it. There is no evidence that these bills were in this condition. On the contrary, it appears that they were bills drawn by the house on New Orleans, to be accepted by the firm there. The proceeds of the bills were placed to the credit of the drawers. John Mahard, jun., conducted the house in Cincinnati, and his brother William the one in New Orleans. If these bills were not accepted before they were negotiated with the banks, and the holders had paid no valuable consideration for them, they were discounted and not purchased. It is probable, that this distinction was not adverted to by the banks, but it was important, as it gave the character to the transaction. If the bills had been purchased at a discount of twenty per cent., there could be no legal objection to them. But, if they were discounted, with a reservation of interest exceeding the rate of six per centum per annum, it was usurious. And this is the question we are now to examine.

There is nothing on the face of the bills which indicates usury; and it is not pretended that interest, as such, above the legal rate was charged. But it is contended, that the exchange charged was colorable only, and with the view of extorting illegal interest. That this allegation is not without plausibility, must be admitted. It seems the banks discounted these bills, when they refused ordinary discounts. Bills were preferred, one of the witnesses says, because they afforded, by the exchange, a higher profit to the banks. And then it appears, that sight bills on New Orleans uniformly sold for a premium.

It seems that the exchange charged had no reference to a specie basis. At the time, the banks had suspended specie payments, and the paper of these banks, in both

cities, constituted the medium of circulation. This paper was at a discount, for specie, of from five to ten, perhaps a greater, per cent. Its value was affected as the prospect of resumption of specie payments by the banks became more or less remote. The resumption by the Cincinnati banks, in March and April, 1842, caused exchange in that city to sell for a premium in New Orleans. It is true, that the holder of bills, payable in either city, could demand payment in specie, unless by the contract currency was to be received; but the paper basis is stated as having some influence on the present question.

The laws of trade equally apply to the business of exchange. The balance must be adjusted by specie or its equivalent. And it is often said, but not with strict accuracy, that the difference of exchange between two places, is the expense of transporting specie from one to the other. That this expense is one of the principal elements of difference is undoubted. But there are other things which materially influence the rate of exchange. When specie becomes a commodity, as it does when used to restore the balance of trade, like every other commodity its price depends upon the demand and supply. The value of this article is regulated by the vicissitudes of trade. Great as are the fluctuations of exchange in reference to a specie basis, they must be still greater when the basis is a depreciated currency. This introduces a new element, the solvency of the banks, which must be greatly influenced by public opinion. It was in this disturbed state of the currency, that the transactions under consideration took place. The currency of either city became more or less valuable, as it might enable the holder to make profitable investments in foreign merchandise, or other property, or to pay debts.

It is objected that these facts can have no influence on the question under consideration. That they influenced

the rate of exchange between the two cities is undoubted. And if they did this, are they not a part of the case? No just and legal result can be come to, which shall exclude them from consideration. And more especially are they important as conducing somewhat, perhaps, to show the great difference in value in the Cincinnati market, between bills at sight and on time. The longer the time the bill had to run the greater the risk. I do not speak of the legal result, but of the practical and commercial view which influenced the rate of exchange. This view seemed to be necessary from the evidence in the case. But on this question it is unnecessary to go into the grounds of the charge for exchange. The rate of exchange is a fact to be ascertained and established by the evidence. Like the price of any vendible commodity it depends upon the market. If the charge for exchange is a mere shift or device to cover usury, the act is not the less usurious.

Many most respectable witnesses have been examined on this point, and there is no conflict in their testimony. They all agree that the rates of exchange charged by the banks, were the market rates. Banks, brokers, grocers, and all others who purchased similar bills on time, received them at the same rates of discount. No market rate of any thing could be more clearly established. Shall the court inquire into the grounds of this charge, and upon their own views of its propriety and justice, set aside and disregard this evidence? If they may do this in regard to the rate of exchange, why not do the same in regard to the market price of flour or any other article of merchandise? These depend upon the same principle and must be proved in the same way. When the court or jury as the case may be, are not brought by the evidence to the conclusion that the pretence under which the charge was made was a mere cover for usury, they cannot pronounce the act usurious.

It is suggested that a combination may have been formed by bankers, brokers and others, to establish the market rate of these bills. No evidence is produced to establish this, except the supposed unreasonableness of the charge. Whether the banks realised a profit or loss in this business, cannot affect the legal question; but it may not be improper to say, in reference to the character of the persons implicated, that one of the cashiers stated they found it a losing business. The court would require strong evidence to pronounce such a combination against a community so respectable, intelligent and commercial, as that against which the imputation is made. It includes a considerable portion of the most enterprising citizens of Cincinnati. Not only the grocers, brokers, and bankers of the city are included, but the stockholders of the banks.

These views seem to be sustained by the Supreme Court in the case of *Creed v. The Commercial Bank of Cincinnati*, 11 Ohio, 495, where the court say, "on the Louisville bills, (which were for sixty and ninety days) the bank charged six per centum interest per annum, and one per centum exchange, which was the market value of such bills, and the same rate at which they were purchased by other banks in Cincinnati; although exchange between the two places, Cincinnati and Louisville, on sight bills, was at par." And in page 498, "if certain rates of exchange were received, they were the fair market rates at the time."

Some of the bills, it is said, were renewals of former discounts. It is not perceived that this can be material, unless it be connected with the original agreement to renew. Such an agreement would conduce strongly to establish a device to cover usury. Where a bill is drawn on New Orleans, or any other place, *bona fide*, and the acceptor is unable to meet it, there can be no objection to a discount of a new bill at the same rate, to pay the first one. This, it is true, would show an extravagant rate of interest and charges,

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in the course of a year; but the bills discounted are as distinct, as if the proceeds were to be applied to different objects. And in this latter case, the same rate would be charged.

On the 15th of February, 1837, John Mahard, jun., executed a mortgage on the above lot 460, to secure the payment of an annuity to John Mahard, sen., of seven hundred dollars per annum, during his life. Afterwards at the instance of John Mahard, sen., John Mahard, jun., conveyed a part of this lot to William Mahard, who agreed to pay John Mahard, sen., a life annuity of one hundred dollars per annum. At the decease of John Mahard, sen., there was a balance due of the annuities, and there is no doubt that both these liens are paramount to that of the Franklin Bank.

Subsequent to the mortgage on lot 404, to the Franklin Bank, Mahard sold it to Dyer for ten thousand dollars; and the bank, at Mahard's request, released its mortgage on receiving of the purchase money seven thousand two hundred ninety-seven dollars and thirty-three cents, which is admitted as a credit on the claim of the bank. This credit, it is insisted should have been, and should now be, for the full value of the property sold. That the Franklin Bank has no right to release any thing which may prejudice subsequent mortgagees, who, on principles of equity, have a right to impose certain restrictions on the first mortgagee in the sale of the mortgaged premises, and, in fact, to redeem them and claim under the first mortgage.

These general principles must be admitted, but they can only apply where notice was given to the first mortgagee of the subsequent liens as in case of a mortgage to secure future advances; and there is no proof of actual notice in this case. The bank in its answer denies notice, and constructive notice from the recording of the subsequent mortgages is insufficient. It appears that the balance of the consideration was paid to Buckingham, who were subse-

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quent mortgagees. *Guion et al. v. Knapp et al.* 6 Paige, 35. *Nelson's heirs v. Boyce*, T. J. J. Marshall, 401. *Sherras et al v. Craig & Mitchell*, 2 Cond. Rep. 411.

The Franklin Bank also claims a lien on twenty shares of stock under an arrangement with John Mahard, jun., before the 8th of March, 1842, and also under the charter lien of the bank.

Bodman having made a purchase of real property from John Mahard, jun., on which he was to pay the above stock in the Franklin Bank, which he owned, in part consideration; and finding after the purchase there was a lien on the property under a judgment obtained by Tron, against John Mahard, sen. and John Mahard, jun., he retained the stock in his own name to indemnify him against the judgment. This judgment was paid by John Mahard, sen., who now claims that he paid the judgment as the security of John Mahard, jun., and therefore has a right to be subrogated to all the rights of the plaintiff in the judgment, which must be satisfied by a sale of the property purchased by Bodman, or the stock which was received in part consideration for the property.

The charter lien is set up under the tenth section of the act which provides, "that the shares of the capital stock of said bank shall be considered and held in law as personal property, and assignable and transferable, only on the books of the same in the presence of the president or cashier thereof, and in such manner as the directors shall prescribe; but no stockholder indebted to said bank, for any debt or demand due and payable, shall have power to assign or transfer any share or shares he may own of the capital stock therein, &c., until such debt or demand shall be paid or discharged, or collateral security be given," &c. "And said bank shall have the first lien in law on all stock due." To make a legal assignment of the stock the requisites of the charter must be observed; but the equitable interest of

the stockholder may be conveyed *bona fide*, in any other mode, and a court of equity will give effect to such conveyance, as between the parties, if there be no paramount lien on the stock.

After the judgment of Tron was paid by John Mahard, sen., Bodman, on account of the lien of that judgment, had no right to retain the stock. But it is claimed by Mahard sen., who, as surety, paid the judgment. The Mahards, senior and junior, were doing business in co-partnership, when the note, on which Tron obtained his judgment, was executed. Before the judgment this partnership was dissolved, and John Mahard, jun., agreed to pay the debts of the firm. Suit was brought on the note to Tron, which, having been given jointly, authorised judgment against both the Mahards. An execution was issued on the judgment, which was paid by Mahard, sen., and which was returned satisfied. Now the question is made whether, under these circumstances, Mahard, sen., can claim so much of this stock as will indemnify him under the Tron judgment. The judgment constituted a lien on the property of Tron, and the stock was intended by Tron to save him from loss from that lien. That a surety having paid the debt has a right to all the collateral securities held by the creditors is not controverted. But it is insisted beyond this, that the surety is entitled to be subrogated to all the rights of the creditor; and to this effect was the decision in *Merley v. St. Alban*, 11 Ves. 21; and in the case of *Liddesdale's Exr. v. Executor of Robinson*, 6 Con. 656, a sanction is given to the same doctrine. This latter decision was given under a Virginia statute, but in their opinion the court say, "this then is the settled law of the state in which this contract and this cause originated." "But we feel no inclination to place our decision upon that restricted ground, since we are well satisfied with its correctness as a general principle." In that case the court held that the surety, being a joint indorser on a bill of exchange,

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which, by a statute of Virginia had the rank of a judgment, could claim the priority of a judgment creditor from his co-endorser for the amount paid above one half of the debt.

Mr. Justice Story says in his Equity, Sec. 499, "It seems formerly to have been thought that the surety had the right to claim of the creditor, on paying the debt, an assignment to him of the instrument by which it is evidenced." But, he says, "the doctrine is now fully established that the surety has no such right to be enforced in equity." Formerly a surety paying a bond debt, in the marshaling of assets, was considered as having a priority over simple contract creditors; but this doctrine was overruled in the case of *Copis v. Middleton*, 1 Turn. & Russ. 220; and has since been considered as settled by that decision.

After a bond or other instrument evidencing a debt shall be fully paid, it is not perceived how it can be made the ground of a suit. If the surety on the bond shall take an assignment of it, in equity, it might give a control of a suit brought in the name of the obligee; but where the bond is paid the obligee has no claim on the obligor.

John Mahard, sen., was not the surety of John Mahard, jun. He was a principal in the note and in the judgment, and the undertaking of John Mahard, jun., to pay the debts of the firm, at the dissolution of the partnership, could only give a remedy on such contract. When one partner pays more than his proportion of the debts of the partnership, a contribution will be decreed as between co-securities. And in such a case the partner who has made the payment, will be substituted to the rights of the creditor as against the co-partner. To this effect was the case of *Salls v. Hubbell*, 2 John. ch. 393. Hubbell and Bedient were partners, and gave two notes to Salls; Hubbell died, and judgment was obtained against Bedient as surviving partner. Bedient took the benefit of the insolvent act, and executions on the judgments were returned *nulla bona*. Suit was brought on

the judgments against the representatives of Hubbell, and the money was obtained from them. Afterwards it was discovered that Bedient had not returned his real estate in the city of New York on his schedule. The court ordered that a moiety of the judgments should be assigned to the representatives of Hubbell, that the money might be made out of the real estate of Bedient.

Here the judgments against Bedient which had been discharged were set up and a remedy given on them. And this seems to be the doctrine in New York and in some of the other states. *Eddy v. Traver et al*, 6 Paige, 521. But, it is opposed to the modern English doctrine which seems to me to be founded in reason. How a judgment or a bond, having been discharged, can be resuscitated, so as to affect the rights of third parties, I cannot perceive. And if the rights of third parties cannot be affected by such a procedure, I can see no advantage in the principle asserted. As between the parties, it cannot be material in what mode the liability is enforced. And if the remedy contended for can go no farther than this, it is of no value.

A judgment lien cannot be revived after satisfaction of the judgment, to the prejudice of a third party. Why then attempt to set up the judgment, when a direct decree for the payment of the money will give the same remedy? It is a form without substance, unreasonable in its nature, and without benefit in its result.

The judgment obtained against the Mahards has been satisfied, which appears from the return on the execution. Can this judgment be revived and a consequent lien be made to attach on the house and lot purchased by Bodman? I think it cannot. The stock has been transferred to John Mahard, jun. Can the rights of the bank or of other creditors be affected by the resuscitation of the judgment? The same principle is involved in this as in the lien above stated. Third parties are prejudiced by it, who are innocent and in

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the nature of things could have no notice to affect their consciences.

The collateral security given by John Mahard to the bank, discharges its charter lien. Until his debt is paid or secured to the bank by the stockholder, the bank is declared to have the first lien in law on the stock.

In its answer the bank claims the stock under an agreement made with Mahard to receive it at par on account. There is no proof of this agreement, which, in the answer, is stated to have been made on or before the 8th of March, 1842. The fact is not denied by the counsel, and is understood to be admitted.

As soon as the lien of the Tron judgment on Bodman's lot became extinct, the stock virtually became vested in Mahard, and in equity, was subject to the charter lien. And although the lien might not attach from debts collaterally secured, yet the arrangement to take the stock at par, though made on the 8th of March, 1842, must be held valid. There is no knowledge possessed by the bank, shown by the evidence, which can invalidate the transaction.

At the July term, 1841, of the Superior Court of Cincinnati, a judgment was obtained in the name of the Bank of the United States against John Mahard, jun., and John M'Laughlin, for twenty-seven hundred and twenty-eight dollars and sixty-three cents, which was appealed to the Supreme Court, where the judgment was affirmed. As the lien took effect from the time judgment was entered in the Superior Court, it is paramount to the mortgage of the Franklin Bank. An execution was issued on the judgment, which was levied on lots 404 and 460 and other real estate. The Franklin Bank, it seems, agreed to indemnify Dyer, who purchased lot 404, against the lien of the above judgment. This lien under the judgment, extended equally to all the real estate of John Mahard, in the county of Hamilton.

We come now to consider the mortgage executed by Mahard to the Lafayette Bank. It is dated the 7th of December, 1841, and recorded the 13th of January, 1842; and was given to secure the payment of two notes amounting to the sum of fifteen thousand dollars, on one of which John M'Laughlin was indorser, and on the other Andrew Johnson. In its answer the bank denies that the mortgage was executed in contemplation of bankruptcy, or that Mahard was then known or considered to be in a state of insolvency; and it had good reason to believe and did believe he was solvent, and fully able to pay his debts.

To the validity of this mortgage the following objections are made:

1. That it is void, as it purports to secure a demand on which a greater rate of interest is charged than six per centum per annum.

2. That it covers a usurious debt, and is consequently void.

3. That it is void under the second section of the bankrupt law, as it was given in contemplation of bankruptcy, and to give a preference to the bank over other creditors.

The second section of the charter provides, that the "corporation shall not, at any time, take more than six per cent. per annum in advance, on their loans or discounts."

Assuming that a greater amount of interest has been charged than this, the counsel rely upon the case of the *Bank of Chillicothe v. Swayne et al.*, 8 Ohio, 257, to show that it makes void the instrument. This decision was referred to in treating of the mortgage to the Franklin Bank, but it will now be more particularly examined. The charter of the Bank of Chillicothe declares, that "the said corporation shall not take more than at the rate of six per centum per annum, on its loans or discounts." This provision is nearly in the same language and in effect the same, as the provision in the Lafayette Bank charter. The general law of

Ohio regulating interest declares that all creditors are entitled to interest "at the rate of six per cent. per annum, and no more." And in the above case the court very properly remark, "it will be observed that the language is substantially the same with that used in the statute regulating interest."

From this similarity of provision it was insisted that as the general statute, by the well settled construction of the court, made the contract for usurious interest void only for the excess, the same rule of construction applied to the charter of the Chillicothe Bank. To this the court replied, "there is certainly much plausibility and no little force in the argument. But there is another question involved in construing a contract made by a corporation, and that is the question of capacity of the corporation to make such contracts. There is a great difference between natural persons and corporations. Natural persons have capacity and power to make and enter into any contracts which are not prohibited by law, and will be bound by such contracts," &c. "But it is otherwise with corporations. A corporation is a body created by law, composed by individuals united under a common name, &c., and derives all its powers and capacities from the law of its creation." This citation contains the ground on which the court held the contract void.

It may be a matter of some doubt whether, under the rule observed by the courts of the United States, to follow the settled construction of the statutes of the states, by their Supreme Courts respectively, this is an open question. And if this were a general statute there could be no doubt. But it is special, and partakes both of the character of a contract and a law. In this respect we are inclined to think the case does not come within the above rule.

From the view we have taken, the decision of this ques-

tion is not necessary ; but as it has been elaborately argued, it may not be improper concisely to notice it. In doing this we shall suggest some considerations, with the utmost respect, which are not without weight in our own mind. It is admitted that the "powers and capacities of a corporation are derived from the law of its creation." What are the powers and capacities of the "Lafayette Bank of Cincinnati?" It has power in its corporate name "to contract and be contracted with, to sue and be sued, &c. And it is authorised to loan money, buy, sell and negotiate bills of exchange, checks, and promissory notes, and to discount upon banking principles," &c., under the restriction in regard to interest, &c.

Now here is a capacity imparted to do every thing which a natural person could do, in relation to the business specified. The natural persons who compose the corporation are authorised to do in their aggregate capacity, what each one might do in his natural capacity. Now what is the difference between the natural and artificial capacities here spoken of? It is admitted that an artificial person has no power to violate the law of its creation, or any other law. Has a natural person power to violate the law? We suppose not, and in this respect no difference is perceived between the two capacities. It is not a question of capacity, but of prohibition. A natural person is prohibited from taking more than six per centum per annum interest. If it were not for this prohibition, he might agree for any reasonable rate of interest. And if the bank had not been prohibited in like manner, might it not have charged in the same way? Is there any doubt of this? It has power to loan money on interest, and no rate of interest being established by law, may it not contract for the rate of interest as a natural person? If it may not do this, it can do nothing. The prohibition in the charter acts upon the artificial capacity, as the general law, of the same import, acts upon

the natural capacity of every citizen. Repeal the proviso in the charter, and the power of the bank remains, subject to the general law. Is it not, then, clearly a question of prohibition; and is not the only inquiry, whether it does not operate alike upon all capacities, artificial or natural?

This question would seem to be sufficiently answered by the admitted axiom, that all laws must be equal in their operation. But they are not equal, if the same provision is made, by construction, to have a different effect. Can this difference of effect arise from the mere circumstance, that in the one case the provision is in the charter of the bank, and in the other in the general law? Suppose the charter had contained no such provision, could the general law have been so applied, as in the one instance to make void the contract, and in the other to avoid it only for the excess of interest? This, I suppose, would not have been contended by any one. And yet, is not this the question under consideration?

But it is contended, that there is a material difference between the general law in regard to interest and the provision in the Lafayette Bank charter. The Supreme Court said there was no substantial difference between the general law and the provision in the charter of the Bank of Chillicothe; and that provision is in no respect different from the one in the Lafayette Bank. The general law establishes the "rate of interest," on moneys due, at "six per centum per annum and no more." The Bank of Chillicothe "shall not take more than at the rate of six per centum per annum." Now a reservation of more than six per cent. interest is usurious under the general law, as well as under the above charters. They are, then, substantially the same provision. And if a different effect be given to these charters from that which is given to the general law, it must be on the ground that the words, or provisions, in the charters

are to be construed by a different rule from that which governs the construction of the general law.

It is admitted, that where a contract is made in violation of a statute, or of the policy of the law, it is void. And that a usurious contract in Ohio is not only against the statute, but in violation of the policy of the law. But the law seems to be well settled in this state, that usury constitutes an exception from the general principle; so that the contract is only void for the excess of interest. Other states have construed their laws against usury in the same way. Now, whether this construction be right or wrong, is a matter of no importance; it is the law. And if the same rule of construction be applied to the charters of the above banks, the same effect must result, on a usurious contract. That this would be the effect of a usurious contract with a bank under the general law, has not been, and indeed cannot be, controverted. So that the only ground of distinction is, that the same provision against usury in a bank charter renders the entire contract void, while, as a general law, it avoids only the excess of interest.

Can this distinction be sustained on the ground that there is a want of power in the bank to make the contract. This would be unanswerable, if there were not the same want of power to make a usurious contract by an individual. In this respect, the bank and the individual occupy the same ground. Neither can have any implied power to make a contract in violation of law; and the argument, that a bank can do nothing for the doing of which power is not given, whilst an individual may do any thing which is not prohibited, is without force, because it can have no application to the case. The act is prohibited, alike to the bank and the individual. On what principle, then, can the distinction be sustained? As has been shown, the bank has the same power, under its charter, to make a contract for the loan of

money as an individual; and if more than six per centum per annum had not been prohibited, it might have charged more. But the prohibition acts upon the bank as well as upon the individual; and the only question is, does it act alike upon both? I think it does, and that there is no reason arising out of the limited powers of the bank which can affect the question.

The case of the *Bank of the United States v. Owens et al.*, 2 Peters, 533, which is so much relied on, gives no support to this distinction. On the contrary, the question is treated as a general one, arising out of all contracts made in violation of law; and the cases referred to, as illustrating the principle sustained, were contracts between individuals. If the court had supposed that the charter of the Bank of the United States, which prohibited more than six per cent. per annum interest, was to be differently construed from a general law on the same subject, they would have said so, as the case arose under the charter; but no such distinction is made or referred to in their opinion. They seem not to have considered the limited powers of a corporation as having any bearing on the question.

If the bills of exchange were void on the ground assumed, does it follow that the mortgage is void? The mortgage was given to secure the payment of the bills, and it is not denied, that where a contract is infected with usury, the same vice is carried into subsequent contracts covering the same transaction. But the objection now under consideration is not that the bills of exchange were usurious, but that they are void, having been given in violation of the charter. Now, does it follow that the mortgage must also be void? It is not pretended that there is a forfeiture of the sums paid by the bank on the discount of the bills. At most, it can only be argued that the instruments, as evidence of the debt, are void. Is there not, then, a *bona fide* consideration for the mortgage? On a general count, the bank could re-

cover from Mahard the money loaned. And had he filed his bill for relief, setting up the same objection that is now urged, chancery would not have relieved him, except upon the payment of the money loaned, with interest; and this is the light in which the present case might be considered. The assignee represents the interests of the bankrupt and of the creditors. But, except in the case of fraud, the interests of the creditors can only be asserted through the bankrupt. There is no pretence of fraud, in this view of the case; so that the claim set up in the bill, in principle, is the same as if it had been set up by Mahard himself. But it is not necessary to a decision of the case to determine this point, or whether more than legal interest reserved on the bills discounted would make them void, in whole or in part.

Were the bills discounted by the Lafayette Bank usurious?

The facts in relation to the discount of these bills have already been considered, in reference to the Franklin Bank. No more than the legal rate of interest, in advance, was charged by the Lafayette Bank, to which was added the same premiums as charged by the Franklin Bank on time bills. Nothing more need be said on this head.

The third ground remains to be considered, whether the mortgage is void under the second section of the bankrupt law, as having been given in contemplation of bankruptcy and to give a preference to the bank over other creditors.

As the construction of this section has already been discussed, nothing more is now necessary than to examine the facts on which this charge against the Lafayette Bank is attempted to be maintained.

From the evidence it appears that in October, 1841, John Mahard addressed a letter to the bank asking for the loan of fifteen thousand dollars, to secure the payment of which the mortgage was given, to enable the company to carry on its business at Cincinnati and at New Orleans. The bills

on the latter place, discounted by the bank, were about becoming due, and the loan was necessary to enable the firm to pay them.

By this application to the bank it satisfactorily appears, that Mahard had no intention to break up his business, as the loan was obtained to enable him to carry it on. In this view then, it was no violation of the bankrupt law. His object being to continue his business, he could not have executed the mortgage in contemplation of bankruptcy. The time given for payment of one, two and three years, shows great embarrassment; but unless from the circumstances attending the execution of the mortgage the inference is clear, that he intended to break up his business and to give a preference to the bank over the other creditors of the firm, the instrument is not void. This loan was not made, by extending previous loans, but to enable the Mahards to take up drafts which would soon become due. The money was paid by the bank and the mortgage taken at the same time. So that there was no preference in the case; and indeed there could be none under the circumstances. The bank stood more in the light of a purchaser, than in that of a creditor. And the question is, whether Mahard was in a condition to execute a valid mortgage on the advance of money, there being no pretence of fraud in the transaction. I can entertain no doubt on this subject. There is no provision of the bankrupt law which invalidates it. There is no principle in morals which makes it questionable.

John M'Laughlin states that he believes now the Mahards were insolvent in the beginning of the year 1842, but at that time he thought otherwise. In the latter part of the year 1841 or the beginning of the year 1842, Josiah Lawrence, the president of the Lafayette Bank, in a conversation with the witness, said, "that the Mahards had failed or would fail shortly; or were in failing circumstances, or words of similar import." This conversation with Lawrence, in all pro-

bability, was subsequent to the execution of the mortgage. But whether this be the fact or not it cannot affect the mortgage; and the opinion of M'Laughlin in 1842, that the Mahards were solvent, goes rather to strengthen their business transactions at that period. Upon the whole we think that the mortgage to the Lafayette Bank must be considered and treated as a valid instrument.

The above loan of fifteen thousand dollars was to be paid in three equal annual instalments. On the 12th of January, 1842, Mahard transferred forty-nine shares of stock, which he held in the Lafayette Bank, to that bank, as collateral security for the payment of the first instalment of this loan.

On the 15th of December, 1841, the bank discounted a bill for \$3,420 at sixty days, drawn by M'Laughlin on Mahard & Brother, of New Orleans, and indorsed by J. & W. Mahard. This was a renewal of a prior bill of the same amount, same drawer and acceptors, and indorsed by the Mahards and Andrew Johnson. But the indorsement of Johnson on the renewal was omitted, as alleged, through inadvertence. On the 1st and 8th of February, 1842, two notes were discounted, one of \$163 and the other \$162, same drawer and indorsers. No collateral security at the time of these discounts was taken by the bank. But on the 16th of February, 1842, Mahard mortgaged to Johnson lots 404 and 460, on Water street, to indemnify him as indorser on these bills, one held by the Commercial Bank, one by Milne & Co., which has since been paid, and the other, the above bill of \$3,420, held by the Lafayette Bank. This mortgage, it is contended, should be made to enure to the benefit of the bank.

It is also insisted that the forty-nine shares of bank stock should be applied in payment of the above sum and of the two smaller discounts under the lien given by the charter of the bank. The tenth section of the charter provides that the "bank shall have the first lien in law on all stock and

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dividends owned by its debtors; and no debtor to the bank is permitted to transfer his stock, unless he shall have given collateral security for the payment of his debt."

This stock, shortly after the discount of the bill for \$3,420, as above stated, was transferred to the bank as collateral security for the payment of the first instalment of the \$15,000 loan. And the bank now insists that as that instalment was not paid, through the default of Mahard, and as the bank was enjoined from enforcing the mortgage, it is now entitled to a sale of the real property under the mortgage to satisfy it, and that the stock not being applied as was intended, and being released from the transfer, should be appropriated under the charter lien to the payment of the above bill, and the two smaller discounts. On the same paper which contained the assignment of this stock to the bank, John Mahard, jun., indorsed, the 13th of April, 1842, "the forty-nine shares of stock are transferred to John S. Buckingham for value received."

Nearly a month after the discount of the above bill for \$3,420, this stock was transferred to the bank as collateral security for the payment of the first instalment on the large loan. This shows that the bank did not rely upon the lien on the stock for the payment of the above bill. Mahard having given a mortgage to secure the payment of the fifteen thousand dollar loan, that debt was no obstruction to the assignment of the stock. It was assigned to the bank with its assent, and the question is, whether such assignment extinguishes the charter lien. There would seem to be no doubt, that at least for the time being, it does extinguish such lien. If the first instalment of the large loan had been paid by Mahard, by the condition of the assignment the stock was to be re-transferred to him. But the payment was not made, and the stock still remains pledged. It stands, therefore, on the pledge and not on the charter. Had the stock been re-transferred, the charter lien would

have attached, but at present it is extinct, and can only be revived by a re-investment of it in Mahard. Opposed to this re-investment stands not only the first instalment of the large loan, but the assignment of the stock to Buckingham. This assignment could not prejudice the lien of the bank under the transfer; but the stock being placed by the transfer beyond the provisions of the charter, it is no longer under its restriction; and the residuary interest may be assigned, it is supposed, as any other mortgaged property. Whether the assignment to Buckingham is not void, it having been made within sixty days preceding the filing of the petition of Mahard, will be examined hereafter. It is enough to know, in this part of the case, that the charter lien having been destroyed or suspended by the transfer, does not attach to the stock as it now stands to secure the bills discounted subsequently to the large loan. The final disposition of this stock is reserved until the proceeds of the mortgage shall be realised. As regards the general creditors it can be of no importance whether the stock or the land shall be first sold; but if there be additional valid liens on either, it will influence the order of distribution.

The bank also claims that the mortgage given to Andrew Johnson should be made to enure to its benefit.

This is opposed on several grounds, but chiefly because the name of Johnson does not appear on the bill, to indemnify him against which the mortgage was given. In answer to this fact, it is alleged that the omission was inadvertent. That the above bill was the renewal of a former bill of the same amount on which Johnson was indorser.

A creditor may claim all the liens held by the sureties of the principal debtor; and to avoid circuitry of action, he may enforce those liens. This procedure is founded upon the liability of the sureties; for if they are not liable, there can be no ground of claim by the creditor. Now as the name of Johnson is not on the bill held by the Lafayette

Bank, it is not perceived how any liability can attach to him on that bill. It may have been given to renew a former bill, of the same amount, which had the indorsement of Johnson. But that bill has been paid by the renewal, and consequently the indorser is discharged. Now the liability of an indorser is a matter of law, there being no consideration by which, in equity, he can be made liable. Had there been an express agreement by Johnson to indorse the bill, by reason of which it was discounted, and through inadvertence his name had not been indorsed, on sufficient proof equity might compel him to indorse the bill. But this is not the case before the court. There is no other evidence of Johnson's connection with the bill, than his indorsement of the one paid by it, and the provision in the mortgage to him in relation to it. The mortgage seems to have been executed by Mahard, and delivered for record without the knowledge of Johnson.

It is not perceived on what ground of equity M'Laughlin, who is surety on the bill for \$3,420, can claim to be indemnified under the mortgage to Johnson. A co-security may claim that property given to indemnify one security shall be sold for the benefit of both; but, in this case, Johnson cannot be considered as a co-security, seeing his name is not on the bill.

At the July term of the Superior Court of Cincinnati, a judgment was obtained by the trustees of the Bank of the United States against John Mahard, jun., as principal, and John M'Laughlin as security, for \$2,728 63; which was appealed to the Supreme Court, in which at April term, 1842, a final judgment was rendered for \$2,979 69. Execution was issued on this judgment, which was levied on all the real estate of Mahard in Hamilton county. This constitutes a lien on the above property from the date of the judgment in the Superior Court, and is prior to that under the mortgage to the Franklin Bank, and all the other

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mortgages of subsequent date. On a sale of the property the proceeds must be so distributed as to satisfy the largest amount of valid liens. This will conform to the principles of equity.

M'Intyre, it appears, holds a mortgage on the farm recorded the 22d of March, 1832, to secure the payment of two notes of four hundred dollars each. This mortgage, being the earliest lien on the farm, must be first paid.

On the 13th of January, 1842, John Mahard, jun., mortgaged, to the Northern Bank of Kentucky, certain real estate in Kentucky, to secure the payment of certain bills drawn by J. & W. Mahard, indorsed by Andrew Johnson, accepted by Mahard & Brother, of New Orleans. Some of the bills were indorsed by Johnson and John M'Laughlin. This mortgage was recorded two days after its execution. The bank filed its bill in July, 1842, and obtained a decree for the sale of the mortgaged premises, which were sold for \$11,202.63, including rents. This left a balance on the mortgage debt of more than \$5,000, with which the indorsers of Mahard were charged.

The bank also claims the benefit of a mortgage on personal property, executed by Mahard to Johnson, March 18th, 1842, to secure the bills indorsed by him to the bank. This mortgage was assigned to the bank, June 3d, 1842, and the bank agreed to release Johnson from his indorsements, provided the property mortgaged should be decreed to it. On this assignment, proceedings were instituted, in the names of Johnson and the bank, in the Superior Court of Cincinnati; and, by an order of that court, the property was sold for about \$1,300, after paying costs. And this sum the court decreed to Buckingham, who had levied an execution upon it, holding the mortgage to Johnson void.

On the bills discounted by the bank, the same interest was reserved, and exchanges charged, as in the discounts of similar bills about the same time, by the Franklin and

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Lafayette Banks. There is nothing in this case which distinguishes it from the discounts of those banks which have been considered. We, therefore, hold that these discounts were not usurious, nor the instruments given to secure the same void, under the charter of the bank. Nor are there any facts conducing to show that, in the execution of this mortgage on the real property, Mahard contemplated bankruptcy, or that the bank could have had any notice of such intention. From the evidence, it appears that, in obtaining the loans from the bank, and the extension of them, he was endeavoring, in good faith, to surmount his embarrassments. By the frequent conversations of John Mahard, jun., and his oath, at this time, it appears he hoped to sustain himself, and that he cherished the same hope for several months afterwards; and there is nothing in the case which authorises a doubt that he acted in good faith. Like hundreds of others struggling under embarrassments, he did not see or apprehend the bankruptcy which was before him.

A question is made, whether the court can take jurisdiction of the mortgage on the real estate in Kentucky. As no ground is perceived on which that mortgage can be invalidated, or the proceedings on it in the state court avoided, the question of jurisdiction becomes measurably unimportant. On this point, however, it may be proper to remark, that the bank having submitted to the jurisdiction of the court, by filing its answer in this case, it must be considered as before the court, for the purposes of the complainant's bill. A decree cannot operate as a conveyance of land out of the state, as it does, under the statute, within the state; but this is a matter which does not affect the jurisdiction. Having jurisdiction of the parties, by a voluntary appearance, the court may decide the controversy between them, and effect may be given to the decree, as the law shall authorise.

The validity of the mortgage to Johnson on the personal property will now be considered. This mortgage was dated the 18th of March, 1842, and was given to secure the mortgagee against certain indorsements referred to. It was executed by Mahard without the knowledge of Johnson, and delivered to the recorder of deeds. This is not, of itself, a circumstance which would excite strong suspicion against the deed. It might be shown to have been done with a *bona fide* intention.

The property covered by the mortgage was personal, and it remained in possession of Mahard. This is a badge of fraud, though it may be susceptible of a satisfactory explanation. One or two articles were delivered in the name of the whole. By an agreement of the same date as the mortgage, Mahard was to take charge of the property, and to make sales thereof, in whole or in part, consulting and advising with Johnson, and paying the proceeds to his benefit.

This mortgage was executed but little more than sixty days before Mahard filed his petition. The house of Mahard & Brother failed about the 1st of March, and the mortgage was dated the 18th of the same month. It was executed without the knowledge of Johnson. Mahard continued to exercise acts of ownership over the property, selling a part of it at different times, and offering to sell the whole of it. At one time, he proposed to sell at auction; at another, to take the property down the river for sale. Occasionally, though not generally, in selling and offering to sell parts of the stock, he would refer to Johnson's mortgage, and say he was acting with his consent. But, upon the whole, he seemed to exercise, in every respect, acts of ownership over the property; and, indeed, he says that Johnson consented that he should sell the property, at the prices proposed, in payment of other debts than those indorsed by him. About the middle of May, 1842, in a con-

versation with one of the witnesses, Johnson said he held a mortgage on the property, for the benefit of Mahard's creditors generally; that he had a claim, but that he did not consider the mortgage as securing it more than the claims of other creditors. Upon the whole, we think that this mortgage, under the circumstances, cannot be sustained. It was given to protect the property from other claims, and, under such protection, to enable Mahard to pay his debts, by selling the property at exorbitant prices. To this Johnson assented. This deferred and hindered creditors, which avoided the instrument under the state law. It was also void, as having been given in contemplation of bankruptcy.

At the date of this instrument, Mahard could have had no rational hope of paying his debts. Whatever may have been his declarations to the contrary, the accumulation of his embarrassments must have convinced him that the crisis could no longer be postponed; and he resolved to adopt the desperate expedient, to cover his personal property by the mortgage to Johnson, that he might pay his debts with it at any price he might impose. For a cow, he asked \$1,200; for some of his Berkshire hogs, \$300 a piece; small pigs, \$60 a pair; for calves, \$100 a piece; cows, of common stock, \$50 a piece, not worth more than from ten to twelve dollars. A schedule of the property, at these prices, was exhibited by Mahard, which made an amount of about \$26,000. It was, no doubt, expected that, seeing his embarrassments, and knowing that this property was under mortgage, his creditors would become purchasers at any price. This object is fairly inferrible from the facts, and as, from the face of the mortgage, a preference was given to Johnson, it is void under the bankrupt law, and also under the state statute.

The mortgage set up by the Commercial Bank will be now examined.

On the 16th of February, 1842, John Mahard conveyed to

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Andrew Johnson all his interest in lot 460, in Cincinnati, conditional that the mortgagor should cause to be paid unto the said Johnson, or rather protect and save him harmless from "his liability as indorser" of a certain bill of \$3,500 indorsed by him for Mahards; the mortgage being "to secure said Johnson on his indorsement as aforesaid." In October, 1842, a judgment was obtained by the bank on the above bill against the Mahards as drawers and M'Laughlin and Johnson as indorsers. On which judgment execution was issued and returned no property found.

This mortgage was executed and recorded without the knowledge of Johnson. Mahard states that he believed at the time this mortgage was given, they would be able to meet all their liabilities; but he was desirous of securing his indorsers against any contingency, and with that view the mortgage was executed. The debt to the bank was a *bona fide* one, and Johnson was liable for it as indorser. At this time the house in New Orleans had not failed, and there is no reason to doubt that Mahard believed, as he has sworn, that they would be able to sustain themselves. And from the facts, there is reason to believe, that Johnson did not consider the Mahards insolvent. As the mortgage was executed without his request, it appears he could have felt no very great solicitude in regard to his liabilities as their indorser. On the whole we think this instrument cannot be held void under the second section of the bankrupt law, as having been made in contemplation of bankruptcy and with a view to give the Commercial Bank a preference over other creditors.

But this mortgage was afterward declared on the record to be canceled through the influence of the Buckinghams, who were interested in annulling it. This procedure was procured through the misapprehension of Johnson, and cannot operate to the prejudice of those who might claim under the mortgage. Being indorser to the bank, Johnson,

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as mortgagee, became the trustee of the bank, and could not destroy that which was designed by the mortgagor, if such be the construction of the mortgage, for the benefit of the bank. And more especially would a court of equity disregard the cancelment of such an instrument by the trustee, through the fraudulent representations of interested persons.

It is objected that this is a mortgage of indemnity merely, and that unless Johnson be damnified, neither he nor the bank can claim any thing under it. A judgment has been obtained against Johnson as indorser, on the bill of exchange named in the mortgage, and this fixes his liability. Must the bank proceed against him and sacrifice his property, if he have any, before it can reach the property pledged for his indemnity? On the contrary, may not the bank proceed directly against the mortgaged property? This would seem to be equitable. It saves the security and subjects the property of the debtor, as it should be subjected, to the payment of the debt. No objection is perceived to this principle. The solvency or insolvency of the surety cannot affect it. If the procedure against the property pledged in any degree is made to depend upon the amount of property the surety may have, then in every case the surety must pay the money, by suffering a judicial sale of his property or otherwise, before the mortgaged property can be reached by the creditor. This would be in violation of the plainest equity, and contrary to the established mode of chancery proceedings. When justice can be done and a circuitry of action avoided, chancery will do it. A surety is damnified, when a judgment is obtained against him. And this gives him a right to proceed against the pledged property of his principal; and with the consent of the creditor, it may be made answerable for the payment of the debt. 1 Story's Eq. sec. 502, 638; United States Bank, 4. Dana 27; *Green v. Dodge et al.* 6 Ohio, 85; *Wright v. Morley*, 11 Ves.

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22; *West v. Belcher*, 5 Mun. 187; *M'Malon v. Fawcett*, 2 Ran. 514; *Tauberly v. Anderson et al*, 4 Dess. 44.

The Commercial Bank has only the lien, through Johnson, on lot 460, and as the judgment of the Bank of the United States against Mahard and M'Laughlin is a lien upon that lot, and the other real estate of Mahard, and also of M'Laughlin's, it is claimed that the judgment should be made out of the other property of the defendants, or at least that their property should be exhausted before the lien is enforced against the above lot. It is a common principle in equity where two or more tracts of land are covered by a lien, and there is another lien upon one of the tracts, to require the lien common to the whole property first to exhaust that part which is not common to both liens. And this will be done in the present case. As the whole property must be sold, the distribution of the proceeds will be made in accordance with this principle.

The two mortgages executed by Mahard to Mark Buckingham and to Mark and John S. Buckingham, dated 21st February, 1842, on lots 404 and 460, will be next examined.

This instrument, it is alleged, is void under the second section of the bankrupt law, it having been given in contemplation of bankruptcy and to prefer the mortgagees to other creditors.

As Buckinghams had some connection with the Mahards in the fall of 1841, it is insisted, that they must have known that they were insolvent and on the verge of bankruptcy before the mortgage was executed. It is not shown that the connection referred to extended farther, by the Buckinghams, than to occupy the pork house of Mahard in Cincinnati, and to ship pork to the house of Mahard & Brother in New Orleans. These shipments go very strongly to refute any presumption of knowledge injurious to the credit of the Mahards; and on the contrary show that the Buckinghams had confidence in their ability and integrity. And there is nothing in the evidence which goes to destroy this confi-

dence, until the failure of the house in New Orleans. About that time, Mark Buckingham, being in New Orleans, seems to have been fully apprised of the desperate condition of that house, and of the urgent necessity of using the utmost circumspection and vigilance to secure their claim against the Mahards. This was in the early part of March, 1842, subsequent to the date of the mortgage. These facts, therefore, cannot be made to have any bearing upon the execution of that instrument. And aside from these, no facts have been proved which show that the mortgage was given in contemplation of bankruptcy, and to give an illegal preference.

There are prior liens on the property covered by this mortgage, which may exhaust it; and if this shall not be the case, the Buckinghams must show that they are liable for the debts secured by it, or have paid them. This is a matter which will necessarily come up on a final distribution of the proceeds.

The judgment confessed by Mahards, in favor of Buckinghams, is the next question to be considered.

On the 7th of April, 1842, a power of attorney was executed by John Mahard, jun., to William Corry, Esquire, authorising him to confess a judgment in favor of the Buckinghams, for about the sum of fourteen thousand dollars; and on the succeeding day a judgment for that sum was confessed. This was within sixty days before the petition of Mahard was filed. An execution was issued on the judgment, which was levied on the personal property of the bankrupt. Was this proceeding void under the bankrupt law?

The first proviso of the second section is, "That all dealings and transactions by and with any bankrupt, *bona fide* made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act." Now, this very clearly implies

that transactions within the two months, though *bona fide*, are not valid. For, to make transactions valid before the two months, they must have been entered into in good faith. The proviso, therefore, if it mean any thing, as to transactions within the two months, intended to place them upon a different footing from transactions beyond that limitation. This is the clear inference from the language of the section. But, it is asked, is every sale across the counter, within the two months, void? This is not a fair test of the principle. For although it may be impracticable to avoid minute transactions, yet is this any reason why large and important transactions should be held valid? A man, to defeat his creditors, may distribute his property in such small parcels, as to render any attempt to reclaim them impracticable. But from this it would not follow that creditors might not set aside the entire stock of a merchant, fraudulently transferred.

That Congress have power to adopt a provision having the above effect, is undoubted. Under the bankrupt power, they annihilate the contract—not being restrained or prohibited, as the states are, from impairing its obligation. It is, then, a question of policy with Congress, and, with the courts, a question of construction. And it must be admitted, that some effect must be given to the proviso; and if this be done, it follows, that a contract made within the two months is not to be treated as a contract made before that time. But, in disposing of this judgment and the execution which issued upon it, we need not rely upon this construction of the proviso.

At the time this judgment was entered, Mahard had no visible means, except the property afterwards levied on. The house at New Orleans had failed. Mark Buckingham's letters from that place show how utterly hopeless was the prospect of finding any assets of that concern. He imposed on his friends at Cincinnati the utmost caution,

in order to reach the property of Mahard at that place. The business of both houses had been broken up; their credit gone. Mortgages had been multiplied on the real and personal property of Mahard; and even this personal property had been covered by a mortgage. In this desperate condition of Mahard's affairs, he was induced to yield to the pressure of the Buckinghams, and give a warrant of attorney to confess the judgment. The judgment was entered, and the execution was issued and levied. And yet it is contended, that these facts do not show a contemplation of bankruptcy by Mahard, or a preference of the Buckinghams as creditors. The judgment, if valid, constituted a lien on the real estate, and the levy of the execution a lien on the personal property. These proceedings were had with the consent of Mahard, and could only have been had with his consent. The warrant of attorney was not signed by William Mahard, until some time after the rendition of the judgment.

In the first section of the bankrupt act, it is declared, that if a debtor "shall willingly or fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution," he is guilty of an act of bankruptcy. Do not the acts of Mahard bring him within this provision? By the confession of the judgment, did he not procure the lien consequent upon that judgment, and also the execution which was levied on his property? Is not the judgment lien a "security," within the second section of the act? It is a matter of surprise, that a procedure so open as this—a procedure so plainly in violation of the bankrupt act, and coming, too, within the two months before filing the petition, should be attempted to be sustained. The judgment and execution were void under the act.

Where a suit had been commenced in the ordinary course of judicial proceeding, and a judgment had been entered

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within the two months, it might not be void. But where, by the consent of the bankrupt, the proceeding is commenced and consummated in a few days, within the two months, there could be no more glaring and indisputable act of fraud against the bankrupt law. No analogies drawn from the bankrupt laws of England, which, in many of their provisions, are wholly different from this act, can aid us in giving a construction to it. And the same remark may be made in reference to our former bankrupt act, and to the constructions given to it by the state courts.

The transfer, by Mahard, of the forty-nine shares of the stock of the Lafayette Bank, having been made to John S. Buckingham on the 13th of April, 1842, but little more than one month before the petition in bankruptcy was filed, and under a knowledge of the above facts, must be held as void under the bankrupt act.

DRISKILL v. PARRISH.

[This case was decided in 1847.]

Where a written power of attorney is given to an agent, authorising him to arrest a fugitive from labor, and he acts under such power in attempting to make the arrest, the power must be produced, or its contents proved, in an action against an individual for hindering the arrest.

No one incurs the penalty under the act of Congress for hindering or obstructing the arrest, who does not act "knowingly."

He must have notice that the colored persons are fugitives from labor, and that the agent has authority to arrest them.

The principle is the same, whether the arrest be made with the view of removing the fugitives out of the state, or taking them before a judicial officer.

The power of attorney is in the nature of process, and should be shown, if demanded.

No one incurs the penalty who hinders an arrest by persons who have no authority to make it.

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To obstruct the arrest is an offence, and the guilt of the party charged should be clearly established.

There can be but one penalty for the same act, in hindering an arrest, of one or many fugitives from labor. And so of harboring one or many at the same time.

The penalty is not given as a compensation to the master, but as a punishment for the offence.

To harbor or conceal under the statute, there must be a manifest design to elude the claim of the master.

An open and fair action, with an intention to procure a fair legal hearing for the fugitive, is no violation of the act.

Mr. Stanbury for plaintiff.

Messrs. Lane and Chase for defendant.

OPINION OF THE COURT.

THIS action is brought under the fourth section of the act of Congress of 1793, respecting fugitives from labor.

The section provides, "that any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor," &c., "or shall harbor or conceal such person after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars."

The declaration contains four counts; two for hindering and obstructing the arrest of Jane Garretson, a colored woman, and her son, slaves of the plaintiff, who were fugitives from labor; and two counts for harboring and concealing them.

The defendant pleaded not guilty.

Col. Mitchell, a witness, states that he called with Driskill, son of the plaintiff, at defendant's house in Sandusky city, and inquired of him whether a colored woman named Jane Garretson was there. The defendant answered she was; the witness then asked if he could see her; defendant replied yes, if she wishes it. Witness said, "she was a slave of Peter Driskill, had escaped from her master, and

that he was authorised to take her to Kentucky." The defendant went into the house and soon returned, the woman following him. She recognised the witness, spoke to him, and was approaching him, when the defendant interposed his hand, though he did not touch her.

She called young Driskill master Jackson. Some conversation was had respecting the death of her young mistress, who had died, as she said, before she left Kentucky.

The boy was then asked for, and he was brought out. He also knew the witness and Driskill, and by his approach seemed to wish to shake hands with the witness, when the defendant interposed his hand and said, it was not necessary to shake hands.

The witness then claimed the right to arrest these two persons, to take them before some judicial officer, and show the right of the plaintiff to their services. The defendant asked by what authority; the witness replied by virtue of a power of attorney from the master, and laid his hand upon the paper; the defendant objected to the authority and said, that nothing less than judicial authority was sufficient or would satisfy him. He then by words or signs directed the woman and her son to return into the house, which they did, and he followed them, shutting the door after him.

The witness states that he lives near to the farm of the plaintiff in Kentucky, and is well acquainted with Jane and her son, and that they are the slaves of the plaintiff. That they absconded from his service some months before, with other colored persons owned by him.

Driskill being sworn, with less minuteness, relates the leading facts as stated by Col. Mitchell. He differs from Mitchell in saying that the defendant pushed Jane and her son into the house.

Sarah Gustin was an inmate of the defendant's house. She stood in the passage and heard a part of the conversation. She heard the defendant say to Col. Mitchell, that he

could not take the colored persons unless he had lawful authority.

Parol evidence was then offered to prove the authority of Col. Mitchell to arrest the fugitives, as agent of the plaintiff. This was objected to by the defendant, on the ground that the authority was in writing, and consequently could not be proved by parol.

This is an important question. Mitchell did not claim to act in his own right but as the agent of the plaintiff, and he referred to a written power of attorney as his authority. The defendant can take no exception to the power, from the fact that it was not shown to him. He declined an examination of it, alleging that judicial authority was required to make the arrest. In this he was mistaken; and his error, in this respect, constitutes no excuse. The question is not strictly whether a parol authority may not authorise an arrest of a fugitive from labor, but whether a written authority may be abandoned, and a parol one substituted. We are aware that there are many things in writing which may be proved by parol, without proof of the loss of the writing. But does this power of attorney come within this rule?

In the case of *Johnson v. Tompkins*, Baldwin's Rep. 581, it is said, "if the person arrested is not a servant or slave, or the person making the arrest has not the authority of the master for so doing, he is in either case liable for the illegal arrest." And Mr. Justice Washington, in 4 Wash. 329, says, "that it was sufficient to bring the defendant within the provisions of the law, if having notice either by the verbal declarations of those who had the fugitive in custody, or were attempting to seize him; or by circumstances brought home to the defendant, that the person arrested was a fugitive, or was arrested as such."

The object of the arrest in the present case was avowed to be, to take the fugitives before a judicial officer. But the

same principle applies where the arrest is made for the purpose of taking the fugitive by force out of the state, and without judicial sanction. This the claimant or his agent may lawfully do, under the constitution of the United States, according to the doctrine laid down by a majority of the judges in the case of *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters, 539. This then, as claimed, is no ordinary power. It sweeps aside state laws and state sovereignty, and enables an individual who claims to act as agent to take any person, white or colored, as a fugitive from labor, without any exhibition of his personal authority, or of the claims of the master.

The constitution of the Union, and the laws made in pursuance of it, are declared to be paramount to the laws or constitution of a state. But from this it does not follow that the remedy under the federal power, against fugitives from labor, being in the hands of the master, may be exercised without restriction and without regard to the rights of others. The common law doctrine of recaption is adverted to as authorising this remedy, independently of the constitution and the act of Congress. The right of recaption was limited to the sovereignty in which the right was sanctioned. Neither the laws of nations nor the common law authorise the master to recapture his slave beyond the jurisdiction in which slavery is sanctioned. The constitution and the act of Congress give the remedy in this case.

It may be admitted as between the master, or his agent, and the fugitive, the inquiry would be, whether the master had a legal claim to the services of the fugitive. And if this claim were not sustained, the person making the arrest would be responsible in damages. The authorities above cited, from Baldwin's and Washington's reports, seem to place the person who shall obstruct or hinder the arrest on the same footing, in this respect, as the fugitive. But we

cannot assent to this view. The fugitive stands upon the fact of service, and if this be against him, by whatever means he may be returned to his master, he could recover no damages. But the defendant cannot be subjected to the penalty of five hundred dollars, under the act, unless he "knowingly and willingly" obstructed or hindered the arrest. This is called in the act an offence, and had not the statute given a civil action for the penalty, it might have been recovered by an indictment. Now, can an individual commit this offence unless he have reasonable knowledge, not only that the persons claimed are fugitives from labor, but that the person making the arrest has authority to make it.

The character of the fugitive may be made known by himself, or by those who arrest him. Or the knowledge of the defendant may be inferred from circumstances. But the authority of the agent must be made known. If he act without authority, no person who "hinders" the arrest incurs the penalty. It is no answer to this to say, that such person acts on his own responsibility and must meet the consequences. He must act "knowingly," which presupposes a knowledge of such facts as authorise an arrest. If he act in ignorance of these facts, he does not act "knowingly."

Bail, it is said, may arrest their principal wherever he shall be found. This is admitted, because the principal as a condition of the recognisance, is delivered to the custody of his bail. But they must have a bail piece as the evidence of their authority to arrest him. "An officer acting out of his precinct is bound to show his warrant." Lord Kenyon observed, "that he did not think a person is bound to take it for granted, that another who says he has a warrant against him, without producing it, speaks the truth." "It is, therefore, very important in all cases where the

arrest is made by virtue of a warrant, that the warrant should at least, if demanded, be produced, to leave a delinquent no excuse for resistance." 1 Chitt. Cr. L. 51.

"If a warrant be defective, or the officer exceed his authority in executing it, if killed, it is only manslaughter; and any third person may lawfully interfere to prevent an arrest under it." 1 East, P. C. 310; Leach, 206; 1 Barn. & Cres. 291. The agent in this case referred to his power of attorney and was ready to produce it, but its production was waived by an objection to its sufficiency. Having acted under this power, must it not be produced in evidence? It is in the nature of process. In fact it was the warrant of the agent. It having been given in writing, precludes the presumption that it was given by parol. Whatever conversation may have taken place between the agent and his principal on the subject of his agency, at length and as the last act, in accordance with legal advice, the power of attorney was executed. Now this power must speak for itself. It is as important as a warrant can be to an officer, and it would seem that in this action, which is brought to subject the defendant to a penalty, it must be produced, or its contents proved, after establishing its loss. This imposes no hardship on the master or his agent. It would be required in claiming an estray horse, found in the possession of any one.

The power may be defective. It may authorise the arrest on conditions which did not happen. Viewing then this power as process, and considering that the same principle must govern, whether the arrest be with the object to take the fugitive before a judicial officer to establish the right to his services, or to take him out of the state, we consider the power to be of high importance. The consequence resulting from its exercise is important to the fugitive, to the claimant, and to the state from whence he is taken. And as a written power of attorney would impose a form

to the proceeding, and tend to prevent abuse, we are strongly inclined to say, it is necessary to authorise an agent to make the arrest. But this point is not necessarily involved in the case, and we do not decide it. We think that the power in question, under the circumstances, must be produced or its contents proved.

Some evidence was given to prove the loss of the power; but nothing was shown from which its loss could be inferred.

The evidence of the plaintiff being closed, a motion for a non-suit was made, and the ground that the declaration charged the defendant with having "harbored and concealed" the fugitives, and not in the language of the act, with having "harbored or concealed them." It is alleged that these words are not synonymous, and that they are not so used in the statute. And that both allegations must be proved.

If the import of these words were different, as contended, still there is no ground for a non-suit. In the act, they are used in the disjunctive, so that, although they are alleged conjunctively in the declaration, the proof of either would sustain the action. In slander, it is now allowed to be sufficient if the plaintiff prove some material part of the words laid; and, if his count contain several additional words, he is entitled to a verdict on proving some of them. *Compagnon v. Martin*, 2 W. Bl. Rep. 790. If a plea in trespass aver two matters, either of which is a good justification, though both be put in issue by the replication, proof of one is sufficient. *Spitsbury v. Mirclethwaite*, 1 Saund. 146. So, where a declaration for a false return to a *fi. fa.* against the goods of two, averred that both had goods, it was held sufficient to prove that one had goods within the bailiwick. *Jones v. Clayton*, 3 M. & S. 349. So in an indictment, only so much need be proved as charges the defendant with a subsequent crime. *Rex v. Hunt*, 2 Camp. 583; *Rex v. Williams*, Ib. 646; 2 East. P. C. 515.

DEFENDANT'S EVIDENCE.

Mr. Barbour—was present at the trial in the court house, at Sandusky City, and heard defendant relate the occurrences before his door, which were assented to by Col. Mitchell as correct, with the exception of the advance of the boy to shake hands with him, which was omitted by defendant.

This statement, thus assented to by Col. Mitchell as correct, did not contain any demand by him, in relation to the arrest. He admitted that defendant said he was a law abiding man, and wanted only a fair and legal trial. And Col. Mitchell said that he did not complain of the defendant's acts, for that he had treated him as a gentleman. To this the defendant replied, that Col. Mitchell had acted like a gentleman.

Mr. Beecher—who was present at the court house on the same occasion, and heard the statements made by Col. Mitchell and the defendant, corroborates the relation made by Mr. Barbour; in some parts, stating the facts more minutely than he did.

Mr. Henry—heard only a part of the conversation at the court house. So far as he goes, he corroborates the statements of Barbour and Beecher, except, he has no recollection of hearing any thing said about a fair trial.

Col. Mitchell—being again called, says, he cannot recollect distinctly the words, at the various conversations had at the court house. He admits that he assented to the facts stated, as related by Mr. Barbour and Mr. Beecher, except the remark of the defendant, "that he was a law abiding man, and wanted only a fair trial;" which remark, he says, was not made before the defendant's door, but after that interview, and at a different place. He repeats, that, at the first interview with the defendant, before his door, and

in the presence of the colored persons, he claimed the right to arrest them as fugitives.

The above, gentlemen of the jury, is a concise, but substantial statement of the evidence in the case. As the court have excluded parol proof of the authority of the agent, he having acted under a written power, the plaintiff does not rely upon the two first counts for "obstructing and hindering" an arrest. He relies upon the other two counts in his declaration, which charges the defendant with having "concealed and harbored the fugitives."

The action is founded upon the statute, which subjects any one "who shall conceal or harbor" a fugitive from labor, after notice that he is such fugitive, to a penalty of five hundred dollars. The language is in the singular number, and as the declaration charges the defendant with having harbored two fugitives, which the evidence has conducted to prove, the plaintiff claims the penalty of five hundred dollars in each case.

This construction of the act, the court think, is not sustainable. There can be but one penalty for concealing or harboring at the same time, whether there be one or many fugitives. The act is a penal one, and was not framed with the view of giving a compensation to the master for the injury done. In the same section which gives to the master this action for the penalty, it is added, "saving, moreover, to the person claiming such labor or service, his right of action for or on account of the said injuries, or either of them."

There can be no doubt, that the same individual may be convicted of "hindering" an arrest of the fugitive, and also of "harboring" him, which will subject him to two penalties, the acts being distinct, and at different times. But whether the "hindering" of the arrest, or "harboring," be of

one or many fugitives, at the same time, the penalty is the same. It is the act of "concealing" the fugitive, or for "obstructing" his arrest, that is punished. If this penalty were to be enforced by indictment, as might have been provided, the act must have received the same construction. An individual who counterfeits the coin of the United States, is liable to be punished, whether he counterfeited one piece or many pieces. So for stealing one or many articles of property. The punishment, in some cases, is inflicted under the exercise of a limited discretion of the court; but where the offence is stealing one or many letters, by a post master, from the mail, the punishment cannot be less than ten years confinement in the penitentiary. Where the punishment is fixed, the court can exercise no discretion. If the defendant be guilty in this case, neither the court nor jury can exercise any discretion in regard to the penalty.

The charge against the defendant is, that he "harbored and concealed" the fugitives in question, after notice that they were fugitives.

That notice, in this relation, means knowledge, has been decided by the Supreme Court. And, from the evidence, it would seem that the defendant was informed by the agent, who held a power of attorney from the master, that the colored persons were fugitives from service. It is also inferrible from the conversation of Jane with the witness, in the presence of the defendant.

Did the defendant harbor or conceal the fugitives? To answer this inquiry, we must understand what is the true import of the words, "harboring or concealing."

By Worcester, the word harbor is defined, "to entertain; to shelter; to rescue; to receive clandestinely and without lawful authority." By Webster, "to shelter; to rescue; to secrete; as to harbor a thief." Worcester defines the word conceal, "to hide; to keep secret; to secrete; to cover; to

disguise." And Webster, "to hide; to withdraw from observation; to cover or keep from sight."

It is insisted, that any one who shall permit a fugitive from labor, after notice that he is such fugitive, to enter his house, and remain for any time, is liable, under the statute, for harboring or concealing him; and that the intention with which the act is done is of no importance, as the act constitutes the offence.

This position as laid down is unsustainable. The intention with which an act is done, gives the character of guilt or innocence to the act. Homicide may be committed innocently. If, in the performance of a lawful act, and without any intention to do evil to any one, by shooting at a mark or otherwise, a person should be killed, no crime is perpetrated.

An officer arrests a fugitive from labor for debt, or a breach of the peace, and retains in his custody such fugitive, the penalty is not incurred. So, if the fugitive be stricken down by sudden disease, and a person, through motives of humanity, shall take him to his house and endeavor to alleviate his distress, no offence is committed. So if an individual shall seize a fugitive from labor, without authority, with the view of returning him to his master, and, in the act of doing so, the fugitive should escape, it would hardly be contended that, for such an act, the master can claim the penalty. And if an individual employ a fugitive from labor, with the view of detaining him until notice can be given to his master, and he gives the notice, but the fugitive escapes, is the individual guilty of "harboring or concealing" him under the statute?

These cases are put, because the counsel for the plaintiff will not controvert them; and they show, that the intention must enter into and give a character to the act of harboring or concealing a fugitive, the same as in every other act of

good or evil, of innocence or guilt. This is the great criterion of human judgment, and, as we believe, will be the criterion of man's final destiny.

The words, "harbor" and "conceal," were not used in the statute as constituting two distinct offences, but as descriptive of the same offence. All our statutes abound with unnecessary verbiage. It would be impossible for an individual to conceal a fugitive who might not be charged with harboring him, in the sense of the statute. In 1 Chitt. Gen. P. 567, cases are referred to where it has been decided, that the employment of an apprentice after notice, is a harboring of him, which gives an action to the master for his wages. The master is entitled to his labor, and, consequently, when he labors for another, who has notice that he is an apprentice, the employer is bound, on equitable principles, to pay the master. But the foundation of the action under consideration is an offence, so denominated in the act, and for which a penalty is inflicted.

To harbor or conceal a fugitive from labor, within the meaning of the statute, it must be done with the view to elude the claim of the master. If a shelter be afforded to the fugitive for an hour, a day, or a week, when there is manifestly no design to conceal him from the pursuit of the master or his agent, or in any way to defeat the legal right of the master to his service, there is no violation of the statute.

The intention is ascertained from the nature and circumstances of the acts done. From these, no unbiassed mind can fail to form a just opinion. Has the conduct of the defendant been fair, open, and such as becomes an individual who respects the laws of his country? Has it been consistent with a desire to give effect to the law, by an impartial inquiry? If these can be answered in the affirmative, he is not guilty. On the contrary, if he harbored

the fugitives after he had notice that they were fugitives from labor, so as to defeat the claim of the master, or in a way that was manifestly designed to defeat it, he has incurred the penalty.

Gentlemen, it is not our province to consider abstract principles in regard to slavery. We deal with legal rights and established law. From these we cannot depart, without a violation of our duty.

[The jury retired, and after having been out several hours, returned into court and declared they could not agree. The court discharged them, and continued the cause.]

INDEX.

ACTION.

Under the Michigan statute, an action may be brought to recover money lost at play, &c. *Grant v. Hamilton*, 100.

On a note payable to Thompson, or bearer, suit may be brought in the name of the bearer. *Sackett v. Davis*, 101.

An action of debt will lie where the sum is certain, and it is the duty of the defendant to pay. *Home v. Semple*, 150.

An action may be brought by the assignee against the acceptor of a bill; and consequently by the payee against the acceptor. *Ib.*

In Illinois, all fiction in the action of ejectment is abolished. *Gillespie v. Reed*, 377.

If the lessor of the plaintiff be a lunatic, the action is well brought in his name. *Gilleland v. Martin*, 490.

The death of the lessor at the time of the demise laid in the declaration, when proved, will defeat the action. *Ib.*

Money fraudulently obtained from a bank, may be sued for before the note given to the bank for the same becomes due. *Gibson v. Stevens*, 551.

A forged note to the bank is no payment, and the bank may sue for the money advanced by it. *Ib.*

An action of trover for bank notes, or for the property purchased with them, would have been the proper action. *Ib.*

But in such a case, an action of indebitatus assumpsit will lie. *Ib.*

A suit for the money disregarding the note is not an affirmance of the contract. *Ib.*

ADMINISTRATOR.

An administrator is not bound to pay over money to a creditor of the deceased partner of the person on whose estate he administers. *Barnes v. Ryder*, 374.

Had such payment been made, the administrator could not have set it up in a suit brought by the representatives of the deceased. *Ib.*

Affidavit. Agent. Amendment. Assignment.

AFFIDAVIT.

An affidavit to hold to bail must be positive as to the indebtedment. *Nelson v. Cutter*, 326.

The opinion or belief of the affiant is insufficient. *Ib.*

On a habeas corpus, the court will inquire whether the capias was rightfully issued. *Ib.*

And this involves the sufficiency of the affidavit. *Ib.*

AGENT.

Agent of the treasury may compromise suits. *United States v. Hudson*, 156.

AMENDMENT.

The court as a matter of course will give leave to amend a bill, so as to obviate the objection made by a demurrer. *Dwight v. Humphreys*, 104.

By the common law amendments were permitted, if there was any thing to amend by. *Nelson v. Barker*, 379.

Anciently all amendments were required to be made at the term when the error occurred. *Ib.*

But now they may be made, at any time before judgment, and, in some cases, afterwards. *Ib.*

A misnomer may be amended after plea in abatement. *Ib.*

Whilst the proceedings were in paper, at common law amendments might be made. *Brush v. Robbins*, 486.

Amendments in England under their statutes, constitute no rule for the courts in this country. *Ib.*

ASSIGNMENT.

A promissory note given to two or more payees, who are not in partnership, must be assigned by all of them. *Dwight v. Pease*, 94.

An assignment of one of two payees, at most, can convey but one half of the interest in the note. *Ib.*

This does not enable the assignee to sue the maker. A note cannot thus be cut up, and suits against the maker multiplied. *Ib.*

An assignment of property to creditors, or for their benefit, to others, cannot be held void for want of consideration. *Lawrence v. Davis*, 177.

To give an assignment of property validity, the assignees must assent to it. *Ib.*

By the common law a debtor may give a preference to certain creditors over others. *Ib.*

And this is not prohibited by any statute in Illinois. *Ib.*

An assignment, by an insolvent person, of all his effects for the benefit of his creditors, to one who is not a bona fide creditor or purchaser without notice, is void under the second section of the bankrupt law. *M'Lean, Assignee, v. Meline et al.*, 199.

Such an assignment is good by the laws of the state, but void under the bankrupt law. *Ib.*

ASSIGNMENT—Continued.

An assignment of the effects of the firm, within two months, of application under the bankrupt law, is a fraud under the law. *M'Lean, Assignee, v. Johnson*, 202.

If one of an insolvent firm apply for the benefit of the act, the assignee takes the entire property. *Ib.*

The assignee of a patent right in part, may sue in law or equity, for the infringement of his right. *Brooks & Morris v. Jenkins*, 250.

A note signed after it becomes due, leaves the equities open, as between the original parties. *Greathney v. M'Lane*, 371.

The assignment made by the late Bank of the United States, is valid by the decision of the Supreme Court of Pennsylvania. *Dundas v. Bowler*, 397.

The statute under which the Bank acted has been construed, as above, and that is a rule of decision for this court. *Ib.*

The law of Ohio can have no effect on the assignment of an instrument in another state. *Ib.*

The act of 1842, which declared the true construction of the act of 1824, cannot have a retrospective effect. *Ib.*

On future contracts the act can take effect. *Ib.*

ASSIGNOR AND ASSIGNEE.

In an action against the assignor, the declaration must allege a demand on the drawer of the note when it became due. *January v. Danton*, 19.

The holder of a note payable to bearer, is not an assignee within the act of Congress. *Sackett v. Davis*, 101.

A payment made to the assignor, after the note was assigned, cannot be set up against the assignee. *Patterson v. Atherton*, 147.

ATTACHMENT.

An attachment laid upon property does not change the ownership of such property. *Starr & Smith v. Moore et al.*, 354.

The defendant may sell it, subject to the lien of the attachment. *Ib.*

Where a deputy marshal fails to pay over money, which he has by color of his office, he may be attached. *Bagley v. Yates*, 465.

When the deputy is not acting in the line of his duty, the marshal is not responsible. *Ib.*

The deputy is an officer of the court, and is subject to its order. *Ib.*

If by the default of the sheriff, property attached is lost, the defendant may plead it in bar, if the goods were equal in value to the judgment. *Starr v. Moore*, 542.

Property in a warehouse is liable to be attached, though the warehouse receipt has been assigned to a commission merchant who makes an advance, if it be laid before notice of the assignment. *Gibson v. Stevens*, 551.

The money being advanced not being equal to the value of the property, the surplus is clearly liable, after notice. *Ib.*

Bankrupt Law.

BANKRUPT LAW.

A conveyance of property in contemplation of a state of insolvency, is void under the bankrupt law. *M'Lean, Assignee, v. Bank of Lafayette et al.*, 185. And any mortgage, or other lien, which is intended to give to one or more creditors a preference over others, is also void. *Ib.*

All the rights of the bankrupt from the time of filing his petition, is vested in his assignees. *Ib.*

The bankrupt power is exclusively vested in the federal government. *Ib.*

From the time of filing his petition by the bankrupt, his rights became vested in his assignee. *M'Lean, Assignee, v. Rockey*, 235.

No subsequent lien is valid. *Ib.*

A petition under the bankrupt law, filed on the 3d of March, 1843, the day the law was repealed, is within the saving of the act. *In the matter of Ankrim, a Bankrupt*, 285.

Formerly acts of Parliament were held to take effect from the commencement of the session. *Ib.*

And by this relation, penalties amounting to a forfeiture of life were incurred. *Ib.*

The maxim that the fraction of a day is not recognised in law, cannot be made to operate cruelly and unjustly. *Ib.*

A liberal construction may be given to the repealing act, in favor of the remedial proceedings under the general bankrupt law. *Ib.*

An application for a jury must be made at the same term at which a bankrupt's petition is dismissed. *In the matter of Hunter*, 297.

In a petition for bankruptcy, a formal plea is not necessary. *S. Book, in Bankruptcy*, 317.

An infant is entitled to the benefit of the bankrupt act. *Ib.*

The proceeding may be had in his own name. *Ib.*

The bankrupt law relieves against a judgment for a tort. *Ib.*

Any one interested in the administration of the effects of the bankrupt may object, though technically he is not a creditor. *Ib.*

A surety of a postmaster is entitled to a discharge under the bankrupt law. *United States v. Davis*, 483.

A public defaulter is excluded from relief under the bankrupt law. *Ib.*

Where, during the pendency of a suit, one of the defendants was released under the bankrupt law, the suit as to him abates. *Fellows v. Hall*, 487.

But the bankruptcy should be pleaded. *Ib.*

The plaintiffs may show the invalidity of the bankrupt proceeding, by fraud. *Ib.*

But this must be done by plea. *Ib.*

In a case of bankruptcy, a receiver will be appointed when necessary. *M'Lean, Assignee, v. Lafayette Bank*, 503.

Under the bankrupt law, suits should be brought in the name of the assignee, and not in the name of the bankrupt. *Cook v. Lansing*, 571.

To a suit in the name of the bankrupt, the defendant may plead the bankruptcy, and the appointment of an assignee. *Ib.*

BANKRUPT LAW—Continued.

In bankruptcy, the court will exercise jurisdiction over distinct interests and parties, on allegations of fraud, in order to adjust liens, and make distribution of assets. *M'Lean, assignee, v. Lafayette Bank*, 587.

The taking of a mortgage from its debtor by a bank, does not show that the bank considered him insolvent. *Ib.*

The second section of the bankrupt act does not render void a contract or conveyance made two months before the bankruptcy, if the party acted fairly. *Ib.*

A contemplation of bankruptcy means a thorough breaking up of his business by the bankrupt. *Ib.*

Assignments made within two months prior to the filing of the petition, are prima facie void. *Ib.*

So of a judgment confessed within the above time, and the proceedings under it. *Ib.*

Retaining the possession of property mortgaged, and exercising acts of ownership over it by selling it, is evidence of fraud. *Ib.*

BILL OF EXCHANGE AND PROMISSORY NOTES.

A bill drawn by a partner on the firm and accepted by him, to pay his individual debt, cannot be collected from the firm by any one who has notice. *Babcock v. Stone et al.*, 172.

But an indorsee without notice may enforce the payment. *Ib.*

A bill drawn and indorsed in Illinois, payable in New York, derives its character from the law of Illinois. *Bank of Illinois v. Brady*, 268.

The law of the place of payment will regulate the interest; but the liability of the indorser depends upon the law of the place where the indorsement was made. *Ib.*

The indorsement is a new contract. *Ib.*

The holder of a bill of exchange, after the demand of the acceptor, and notice to the drawer, is not bound to active diligence. *Barnes v. Ryder*, 374.

No point is better settled than that the holder by giving time to the maker of a promissory note, or bill, for a valuable consideration, discharges the indorser. *Ib.*

The payment of a part of the judgment against the maker of the note, on which time is given, constitutes no consideration. *Ib.*

The defendant was bound to pay the judgment. *Ib.*

An agreement to release the indorser, must be valid, and one on which an action may be maintained. *Ib.*

A note payable without grace, in three months, or any other specified time, is not due until the time shall expire; excluding the day the note is dated. *Hill v. Norvell & Crary*, 583.

The usage of the banks in the District of Columbia, to make a demand on the fourth day of grace, only applies to notes negotiated by the bank. *Ib.*

Notes left with the banks for collection are due on the third day of grace under the general commercial usage. *Ib.*

Bill in Chancery. Bill of Particulars. Bill of Review. Bond.

BILL IN CHANCERY.

A decree may be made as between defendants. *Piatt v. Oliver & Williams*, 27.
 In equity, it is not essential as at law that the parties litigant should be on opposite sides of the case. *Ib.*

Where a trustee disposes of the trust property, the cestui que trust may claim the thing received, if it can be identified. *Ib.*

And this may be done, though the property may be greatly increased in value. *Ib.*

If the present value be the result of skilful labor, this may not be the case. *Ib.*

Where an election is necessary, the parties to a bill praying a specific relief must be considered as having made it. *Ib.*

A bill must be signed by counsel, or it is demurrable. *Dwight v. Humphreys*, 104.

But a signing on the back of the bill is not sufficient. *Ib.*

A demurrer to a bill, which contains allegations of fraud, and strong circumstances of equity, must be overruled. *Burnley v. Jeffersonville*, 336.

In such a case the defendants must answer to the fraud. *Ib.*

A defendant in his answer cannot introduce new matter in the nature of a cross bill. *Morgan et al. v. Tipton et al.*, 339.

The defendant's answer is evidence, only, when it is responsive to the bill. *Ib.*

The court will not give relief against an usurious mortgage, to the person executing it, except on paying the sum due. *Ib.*

BILL OF PARTICULARS.

Where a plaintiff is called on to furnish a bill of particulars, he is limited in his proof to the items thus made out. *Williams v. Sinclair*, 289.

If the bill be found to be erroneous, after the jury to try the cause are empaneled, the plaintiff will have to suffer a non-suit. *Ib.*

BILL OF REVIEW.

The ordinances of Lord Bacon still govern bills of review. *Massie's Heirs v. Graham*, 41.

May be filed for errors of law, or newly discovered evidence. *Ib.*

If the new matter would change the decree, though foreign to the issue, it is ground for review. *Ib.*

The mode of filing a bill of review, is by petition asking leave. *Ib.*

The bill may be considered a petition. *Ib.*

A miscalculation may be corrected, by remitting the excess. *Ib.*

In all cases not necessary to comply with the decree. *Ib.*

Lapse of time will bar a review.

The granting a bill of review, is not a matter of right. *Ib.*

BOND.

A bond is good at common law, if entered into for a valuable consideration, and is not repugnant to any statute or the general policy of the law. *Greathouse v. Dunlap*, 303.

Bond. Chancery.

BOND—Continued.

A bond which shows upon its face an illegal consideration, is void. *Ib.*

Where a bond is required in restraint of liberty, which the law does not require or authorise, it is void. *Ib.*

Bond to pay cost, in a certain suit, is good, though no one be named to whom the payment shall be made. *Buckingham v. Burgess*, 368.

Should the defendant recover the costs, he could bring the suit in his own name. *Ib.*

CHANCERY.

Where the trustee disposes of the trust property, the assignment may convey his own interest, though it do not convey the interest of the cestui que trust. *Piatt v. Oliver & Williams*, 27.

The cestui que trust may claim the thing received in exchange for trust property, if it can be identified. *Ib.*

There must be an answer denying the fraud charged in the bill, in support of the plea. *Lewis v. Baird*, 56.

The answer being broader than the plea overrules it. *Ib.*

Fraud must be denied in the plea, as well as in the answer. *Ib.*

Where one defence is made by the plea, and another by the answer, the plea will be ordered to stand for an answer. *Ib.*

Chancery will always refuse its aid against conscience. *Ib.*

Chancery will decree a specific execution of a contract for land, where the purchaser entered into the possession, and made valuable improvements, although two years have elapsed. *Mason v. Wallace*, 148.

Under the statute of Michigan, a creditor's bill may be filed on a return of the execution by a proper officer, nulla bona, before the return day named in the writ. *How v. Cobb*, 270.

This is more a question of practice, on general principles, than of construction. *Ib.*

The assignees may show that the defendant in the judgment had property. *Ib.*

A rule for answer, in Michigan, where the process has not been served twenty days, is irregular. *Treadwell v. Cleaveland*, 283.

A decree, pro confesso, for want of an answer under such a rule, is irregular. *Ib.*

And the decree will be set aside on motion. *Ib.*

Under the fortieth rule the defendant is not bound to answer, unless special interrogatories be put in the bill. *Ib.*

A court of chancery in any other state than that in which the land is situated, can make no decree which can affect the title to such land. *Tardy et al v. Lewis Morgan*, 358.

But having jurisdiction of the person, a decree respecting land may be enforced. *Ib.*

A conveyance executed under a decree, operates by force of the conveyance. *Ib.*

Chancery. Consideration. Constitutional Law. Contract.

CHANCERY—Continued.

- In such a case, the proceedings in chancery need not be exhibited. *Ib.*
- There is no absolute rule in regard to the multifariousness of a bill. *M'Lean, assignee, v. Bank of Lafayette*, 415.
- The rule is founded on convenience. *Ib.*
- The assignee in bankruptcy, having a right to redeem, may file his bill against all the mortgagees. *Ib.*
- A demurrer admits all the material allegations of the bill. *Ib.*
- By a statute of Michigan, a county may be sued as an individual. *Lyell v. The Board of Supervisors of St. Clair County*, 580.
- When a judgment is obtained against it, the supervisors are required to levy a tax upon the county to pay it. *Ib.*
- But a creditor's bill may be sustained against a county to subject equities belonging to the county, which could not be reached by a suit at law. *Ib.*

CONSIDERATION.

- Where an order is drawn on A. in favor of B., if in funds, its acceptance by A. is evidence that he had in his hands funds of the drawer. *Jewett v. Lull*, 272.
- On such an order B. may maintain an action against A., and his admission of funds in his hands, by the acceptance, shows a consideration. *Ib.*
- An agreement to pay ten per cent., if a certain note given some time before, should not be paid punctually when due, is without consideration, and cannot be enforced. *Shirly v. Harris*, 330.
- But where the agreement was, that the note should be paid in Missouri, or the expense of a trip to Indiana should be paid, there is a sufficient consideration. *Ib.*

CONSTITUTIONAL LAW.

- An unconstitutional law can afford a justification to no one. *Astrom v. Hammond*, 107.
- The act of Michigan, entitled "an act to organise and regulate banking associations," is constitutional. *White v. How*, 111.
- The amendatory bank law, which took effect the 30th December, 1837, somewhat modifies the prior law. *Ib.*
- But acts under the first law cannot be so changed by the second as to increase the responsibility of the directors. *Ib.*

CONTRACT.

- The repeal of a prohibitory act does not give validity to a contract against law. *Milne v. Huber*, 212.
- But the legislature may give a remedy on a contract founded on a valuable consideration, where no remedy exists. *Ib.*
- Such a law is just and is constitutional. *Ib.*
- A note issued in violation of law by a bank, is void. *Hayden v. Davis*, 276.
- A bond executed in Michigan, which relates to a New York transaction, which was void by the laws of that state, avoids the bond. *Ib.*

Contract. Copy. Corporation. County.

CONTRACT—Continued.

To rescind a contract for the sale of a chattel, the property must be returned, unless it be valueless to both parties. *Christy v. Cummins*, 386.

Where a purchase of land is made to be paid for in carpenter's work, until the work shall be done, there is no pretence of claim for a deed. *Stanbury v. Taggart*, 457.

A possession under such a purchase, without deed, cannot by lapse of time ripen into a title. *Ib.*

The purchaser's possession is the possession of the vendor. *Ib.*

COPY.

The copy of a recorded deed may be received in evidence, to show that when recorded, it had a seal on it, which had been removed from the original. *Gillespie v. Reed*, 377.

CORPORATION.

Notes given by a corporation in violation of law are void. *Root v. Godard*, 102.

Public laws which limit corporate powers are notice as well to persons out of the state, where the laws are passed, as to those within it. *Ib.*

Such notes being void in their inception are void in the hands of a bona fide holder. *Ib.*

Under the act of Michigan, approved 15th March, 1837, the directors are made responsible for any excess of loans. *White v. How*, 111.

This act was amended 30th December, 1837, by exercising a reserved power, so that under the amendment the insolvency of the bank fixes the liability of the directors. *Ib.*

A corporation having power to grade streets, &c., necessarily has power to make contracts respecting the same. *Sturtevant v. Alton City*, 393.

Where a principal power is given, every incidental power necessary to give effect to the principal one, is included. *Ib.*

A bank charter which prohibits a charge of interest greater than at the rate of six per centum per annum, should receive the same construction that the words, substantially the same, have received in the general law regulating interest. *M'Lean, assignee, v. Bank of Lafayette, et al.*, 587.

The bank is prohibited the same as an individual from taking more than the legal rate of interest. *Ib.*

Neither a bank nor an individual can violate the law. *Ib.*

It is a question of prohibition as regards the bank and not one of power. *Ib.*

It is the same as to an individual. *Ib.*

COUNTY.

Under a statute of Michigan, a county may be sued. *Lyell v. St. Clair County*, 580.

At common law, a county was not liable to be sued. *Ib.*

CRIME.

The 31st section of the act of Congress, of 30th April, 1790, applies to offences committed after, as well as before the act. *United States v. Ballard*, 469.

The indictment or information must be found within the limitation of the statute. *Ib.*

DEBT.

Debt will lie by an indorsee against the drawer of a note, although there may be intermediate indorsements. *Home v. Semple*, 150.

DECLARATION.

It is sufficient to state the title of the court in the caption of the declaration. *Gasset v. Palmer*, 105.

The venue, if substantially laid, is sufficient, and so of other averments in the declaration. *Ib.*

Where an action is brought by the assignee of a promissory note or bill, the declaration must show the assignor could have sued in this court. *Fry v. Rousseau*, 106.

Where the plaintiff seeks to make the directors liable for excess of loans, under the Michigan statute, the declaration must aver the amount of such excess. *White v. How*, 111.

In trespass, where a day is laid in the declaration, and from such day to the commencement of the action, divers trespasses were committed, one trespass, but not divers, may be proved prior to the day named. But divers may be proved within the time laid. *United States v. Kenedy*, 175.

In a declaration for the violation of a patent right, the improvement must be stated. *Peterson v. Wooden*, 248.

A defendant may waive a defect in a declaration by pleading. *Bank of Illinois v. Brady*, 268.

But if the defendant demur to the plea, the court should look to the first defect in pleading. *Ib.*

If a count in a declaration contain sufficient averments, surplusage will not vitiate it. *Wyman v. Fowler*, 467.

Goods received, which are to be sold at certain prices, or the goods returned on demand; if sold, and the money received, no special demand need be alleged. *Ib.*

DECREE.

A decree pro confesso, when irregularly entered, as a matter of course, will be set aside. *Fellows v. Hall*, 281.

DEEDS.

The legislature may remedy a formal defect of deeds previously executed. *Raverty and Wife v. Fridge*, 230.

DEEDS—Continued.

Where there is doubt whether an instrument has been sealed, the fact may be referred to the jury. *Follett's Heirs v. Rose*, 332.

A deed for land in Indiana, executed out of the state, and acknowledged out of the state, before a justice of the peace, the clerk of the county should certify the authority of the justice, and not the secretary of state. Ex dem. *Strong v. Smith*, 362.

A deed not acknowledged in Indiana, is valid between the parties, and when proved, may be admitted in evidence. *Ib.*

A deed, valid between the parties, executed before an attachment is laid upon the land, and the deed being properly acknowledged and recorded before the deed under the attachment, which was not recorded within twelve months, conveys a paramount title. *Ib.*

Deeds recorded under a statute in Illinois, are made notice to creditors and subsequent purchasers, though not properly acknowledged. *Gillespie v. Reed*, 377.

Under the act of 1831, in Illinois, a deed will convey land in that state, if executed according to the law of the state where it is made. *Moore v. Nelson*, 383.

A statute may make good the defective acknowledgment of deeds. *Ib.*

It operates as a rule of evidence, as regards the execution of the instrument. *Ib.*

DEMAND.

In all cases where the undertaking is collateral, a demand and notice are essential. *January v. Duncan*, 19.

Where a note is made payable at a particular place, a demand at such place, when the note becomes due, is not necessary to maintain an action against the maker. *Silver v. Henderson*, 165.

When a note is deposited with a bank for collection, when due, it is a sufficient demand, if the teller of the bank, presenting the note, inquires of the book-keeper whether a deposit has been made to pay the note, and is informed that there are no funds to pay it. *Browning v. Andrews*, 576.

The demand is good, though the teller acted as clerk of the notary who protested the note. *Ib.*

DEPOSITION.

If in the caption of a deposition the place where it was taken be stated, it is sufficient. *Tooker v. Thomson*, 92.

If the person taking the deposition, states that he does not know of an agent or attorney within one hundred miles, it is sufficient. *Ib.*

A witness may be sworn before or after his deposition is reduced to writing. *Ib.*

Depositions may be taken under the act of Congress, after the expiration of a rule to take them. *Buckingham v. Burgess*, 368.

Deposition. Dower. Entry of Land. Equity. Evidence.

DEPOSITION—*Continued.*

The caption in the deposition naming the suit should be correct. *Ib.*
 But where, from the facts, there can be no uncertainty as to the case, the deposition should be admitted. *Ib.*
 A deposition before a mayor, "certified to be taken in pursuance of the act," is sufficient, though it be not stated that the witness was cautioned. *Moore v. Nelson*, 383.

DOWER.

All the substantial requisites of the statute must be complied with, in taking a relinquishment of dower. *Raverty and Wife v. Fridge*, 230.
 Dower is often claimed under circumstances of great injustice. *Ib.*
 The separate examination of a feme covert, as required by the statute, is indispensable, but the words of the statute need not be used by the certifying officer. *Ex dem. Raverty and Wife v. Fridge, et al.*, 245.

ENTRY OF LAND.

The withdrawal of an entry, by a person without authority, does not affect the claim under the entry. *Ex dem. Gault v. M'Millan*, 20.
 And subsequent sanction of the act makes the withdrawal valid. *Ib.*

EQUITY.

See Chancery.

EVIDENCE.

Occasional intemperance, which produces temporary insanity, not sufficient to set aside a conveyance. *Lewis v. Baird*, 56.
 An assignment of a military warrant, under which a claim has been asserted for many years, may be presumed to be genuine, and to have been made for a valuable consideration. *Ib.*
 An accomplice, though competent, should be cautiously confided in. *United States v. Troax*, 224.
 Unless corroborated in some material facts, should not be sufficient, generally, to convict. *Ib.*
 Where the prosecutor states the offence with greater particularity than he is bound to do, the proof must correspond with the averments. *United States v. Brown*, 233.
 A receipt is only evidence of payment, and may be explained or contradicted by parol. *Weed v. Snow*, 265.
 A note is not payment unless it be expressly received as such. *Ib.*
 Where an order is drawn and is in favor of B., if in funds, its acceptance by A., is evidence that he had funds in his hands of the drawer. *Kemble v. Lull*, 272.
 On such an order, B. may maintain an action against A., and his admission of funds in his hands, by the acceptance, shows a consideration. *Ib.*

Evidence.

EVIDENCE—Continued.

Parol proof is not admissible to show the meaning given by the parties to certain words in a written instrument, the words being free from ambiguity. *Ib.*

It is too late to offer evidence in chief after the testimony is closed. *Ib.*

A treasury transcript to be evidence, must contain the original items of the accounts or balances admitted by the defendant in his official returns. *United States v. Hilliard*, 324.

A balance struck by the treasury cannot, as such, be charged and made evidence. *Ib.*

Where a person is charged by the defendant, through the agency of a third party, the evidence on which such charge was made must be stated. *Ib.*

Whether a paper has been sealed, may be referred to the jury. *Follet's Heirs v. Rose*, 332.

Any forcible indentation of the parchment may be a seal. *Ib.*

Persons accustomed to parchments were examined. *Ib.*

The person who took the acknowledgment, was permitted to state that the instrument must have been sealed, &c. *Ib.*

Unless the inadequacy of price be such as to strike any one with suspicion of fraud, it will not be inferred. *Ib.*

Where a promissory note is made, the consideration of which is to be defeated, if certain bills of exchange shall not be paid, against the assignee of such note, without notice, the non-payment of the bills cannot be set up in defence. *Thomas v. Page*, 369.

The agreement between the original parties would be a fraud on the assignee. *Ib.*

And this is not affected by the statute authorising the defendant to set up any defence against the assignee, that he could use against the payee. *Ib.*

A deed in Illinois, though not acknowledged correctly, if recorded, is notice, and may be used in evidence, by proving its execution. *Gillespie v. Reed*, 377.

A receipt may be explained by parol, and it may be impeached for fraud. *Baker v. Moore*, 387.

A transcript from the patent office may be corrected by another one duly certified. *Brooks v. Jenkins*, 432.

It is not essential that a renewed patent should contain a full statement of the proceedings of the Board. *Ib.*

The functions of the Board are, in their nature, judicial. *Ib.*

Copies of assignment from the records of the patent are evidence. *Ib.*

An administrator may renew the patent of the deceased patentee. *Ib.*

He may assign the right. *Ib.*

The improvement must be accurately described. *Ib.*

It must be so certain, as to enable a mechanic to construct the machine. *Ib.*

The right of Woodworth consists in the combination of certain mechanical powers. *Ib.*

Evidence. Executive. Execution. Federal Government.

EVIDENCE—Continued.

The use of any part of these less than the whole is no infringement. *Ib.*
 Where an individual is proved to have been living within seven years, the burden of proving his death lies upon the party who asserts it. *Gilleland v. Martin*, 490.

Where the clerk is dead, who made the entries in a book of accounts, his hand writing may be proved. *James, assignee, v. Wharton*, 492.

But the original entries must be proved, and not a copy. *Ib.*

If a deed purports to have been executed by the trustees of a town, there must be evidence that the persons who signed it were trustees, and that they had power to make the conveyance. *Wallace v. Dewey*, 548.

An acknowledgment of a deed before a clerk of the court in Kentucky, is not good, without evidence that the person taking the acknowledgment was clerk. *Ib.*

The admission of one defendant does not go to charge his co-defendant. *Buckingham v. Burgess*, 549.

Where a party represents himself as a partner in a certain firm, or permits others to do so, he is responsible as a partner. *Ib.*

And this is the case, although he may not in fact be a partner. *Ib.*

EXECUTIVE.

The executive power cannot be revised and corrected by the judicial. *Astrom v. Hammond*, 107.

Matters of form and discretion are for executive determination. *Ib.*

EXECUTION.

A levy of an execution is said to be in satisfaction of the debt, if the property be of sufficient amount. *Storr v. Moore*, 354.

And this is so, though the property be wasted by the sheriff. *Ib.*

A marshal's sale of land, on execution, will be set aside on motion, if the defendant had no interest in the land. *Rocksell v. Allen*, 357.

This is a proper mode of giving relief, if application shall be made before the sale is confirmed. *Ib.*

Under the decision of the Supreme Court, land must be sold on execution, under the law in force when the contract was entered into. *Rue v. Decker*, 575.

FEDERAL GOVERNMENT.

The power to regulate commerce among the several states, is paramount in the federal government, and cannot be restricted by a state. *Palmer v. Cuyahoga County*, 226.

The government, as incident to its sovereignty, has power to make a contract. *United States v. Lane*, 365.

It may compromise a suit, and receive real and other property in discharge of the debt, in trust, and sell the same. *Ib.*

Federal Government. Fraud. Fugitives from Justice. Fugitives from Labor.

FEDERAL GOVERNMENT—Continued.

The Solicitor of the Treasury is charged with this duty. *Ib.*

Such a procedure does not come under any authority to purchase lands. *Ib.*

That cannot be exercised, except under authority of law.

FRAUD.

The holder of bank notes, fraudulently put into circulation, may enforce the payment of them, if he be a bona fide holder. *White v. How*, 291.

Fraud will not be presumed, from inadequacy of price, unless it be so great as to strike the mind of every one with a suspicion of fraud. *Follett's Heirs v. Rose*, 332.

On the ground of fraud, an indorser of a note may be made liable. *Morgan et al. v. Tipton et al.*, 339.

Fraud may be proved by circumstances. *Tardy v. Morgan*, 358.

Fraud may be set up by the maker of a note against the assignee, who took the note after it was due. *Slacom v. Wishart*, 517.

This cannot be done against a bona fide assignee before the note was payable. *Ib.*

FUGITIVES FROM JUSTICE.

Joseph Smith, being demanded by the Governor of Missouri from the Governor of Illinois, as a fugitive from justice, and the Governor of Illinois having issued his warrant to deliver him over, &c., a habeas corpus was issued by the district judge, holding the circuit court, on which Smith was discharged.

The action being under the law of the United States, the writ may be issued. The evidence did not show that any offence had been committed, by the accused, in Missouri.

On the contrary it appeared that at the time of the alleged crime, the accused was in the state of Illinois. *Ex parte Smith*, 121.

FUGITIVES FROM LABOR.

The constitution and act of 1793, in regard to the surrender of a fugitive from labor, is binding on the state of Indiana, and its citizens, the same as on the other states. *Vaughan v. Williams*, 530.

The laws of Missouri sanctioning slavery must be respected, and rights under them enforced, where a citizen of that state claims a fugitive. *Ib.* An individual is liable to the penalty for a rescue, if he be present and encourage it. *Ib.*

An owner of slaves who takes them to the state of Illinois, and keeps them at labor six months, and then removes them to Missouri, forfeits his right to them as slaves. *Ib.*

Where the agent of the claimant of fugitives from labor acts under a written power of attorney, in a suit for hindering an arrest, under the act of Congress, the power must be given in evidence, or if it be lost, the contents must be proved. *Driskill v. Parrish*, 631.

Fugitives from Labor. Guarantor. Habeas Corpus.

FUGITIVES FROM LABOR—*Continued.*

No one incurs the penalty, under the act, for obstructing the arrest who does not act knowingly. *Ib.*

He must have notice that the persons are fugitives, and that the agent has power to arrest them. *Ib.*

The power of attorney is in the nature of process. *Ib.*

Whether the agent makes the arrest, with the view of taking the fugitives before a judicial officer, or to take them out of the state, the principle is the same. *Ib.*

No one incurs the penalty, who resists an arrest by one without authority. *Ib.*

To harbor fugitives within the act, it must be done with a view to elude the pursuit or claim of the master. *Ib.*

But one penalty can be recovered for obstructing an arrest, at the same time, of one or many fugitives. *Ib.*

And it is the same in regard to harboring. *Ib.*

GUARANTOR.

A letter of credit to a particular firm, and which guaranties the payment, will not bind the guarantor, if the purchase be made of other persons. *Bleeker v. Hyde*, 279.

Such a contract is not to be extended beyond the manifest intention of the parties. *Ib.*

But where the goods are purchased in the name of the guarantor, and he examines the invoices and approves of the same, he is clearly bound. *Ib.*

And especially is he bound, if he take possession of the goods with a view of preventing a loss. *Ib.*

Under such circumstances, no notice of the acceptance of the guaranty was necessary. *Ib.*

A guaranty must have a consideration to support it. *Beebe v. Moore*, 387.

If given at the time the contract to which it relates was executed, the consideration will be found in the contract. *Ib.*

If subsequently, there must be shown a consideration. *Ib.*

To charge a guarantor, on his principal's failure to deliver flour, &c., a demand of the article when due must be made, and a reasonable notice of failure given to the guarantor. *Ib.*

HABEAS CORPUS.

On a habeas corpus, the court cannot look behind the sentence of the court where it had jurisdiction. *Johnson v. United States*, 89.

A habeas corpus may issue, by the courts of the United States, to bring up a person charged with being a fugitive from justice. *Ex parte Smith*, 121.

On a habeas corpus, the court will inquire whether the *capias* was rightfully issued. *Nelson v. Cutter*, 326.

Indictment. Indorser and Indorsee. Injunction.

INDICTMENT.

An indictment for perjury under the bankrupt law, for not giving a true schedule, all the items on the schedule need not be stated. *United States v. Chapman*, 390.

The allegation that the items, naming them, were omitted with intent to defraud A. B., and the other creditors, is sufficient. *Ib.*

Bank notes stolen from the mail, may be laid as the property of the person forwarding them. *United States v. Burroughs*, 405.

A carrier of the mail, for an offence under the law punishable, may be convicted, though not as a carrier. *Ib.*

Being charged as carrier, may be considered as surplusage. *Ib.*

One or more good counts in an indictment, will sustain a general verdict of guilty. *Ib.*

INDORSER AND INDORSEE.

A promise to pay by an indorser, is presumptive evidence of notice, as it acknowledges a legal liability. *Sherman v. Clark*, 91.

Negotiable notes executed in Indiana, payable at the Bank of Madison, in that state, if assigned in Pennsylvania to an unauthorised banking association, the assignee cannot sustain an action in Indiana. *McClintock v. Cummins*, 158.

The *lex loci* governs the contract of assignment. *Ib.*

The assignment being void in Pennsylvania, is also void in Indiana. *Ib.*

A note absolute upon its face, though subject to conditions by another instrument, in the hands of an indorser, with notice, will be treated as between the original parties. *Thomas v. Page*, 167.

The law of the place where the indorsement was made, governs it. *Bank of Illinois v. Brady*, 268.

The indorsement is a new contract. *Ib.*

If the indorsee give time to the maker of a note, the indorsers are discharged. *Morgan et al. v. Tipton et al.*, 339.

If there has been fraud on the part of the indorsers, they may be made liable on that ground. *Ib.*

In Indiana, except notes given to banks, the maker, before recourse can be had against the indorser, must be prosecuted to insolvency. *Ib.*

An assignment of a note is a new contract, and is governed by the place where it is made. *Dundas v. Bowler*, 397.

INJUNCTION—See Chancery.

The court will not enjoin the sale of a similar article under the same patent, in a particular district assigned to an individual, though manufactured in a different district. *Boyd v. Brown*, 295.

The court will not enjoin the proceedings on a creditor's bill, in the state court, where the bill was filed, and process served, before the petition in bankruptcy. *Clarke, assignee, v. Rist*, 494.

Injunction. Interest. Judgment. Jurisdiction.

INJUNCTION—*Continued.*

If fraud were alleged, that would be a ground on which jurisdiction could be exercised. *Ib.*

INTEREST.

Surplus funds in the hands of an agent for purchases, unless demanded, do not draw interest. *Williams v. Baxter*, 471.

Loans made to the city of Detroit, on which interest was to be paid semi-annually, and at the same time coupons were issued for the interest payable as stipulated, held that these coupons, if not paid, entitled the holder to interest. *Hollingsworth v. The City of Detroit*, 472.

JUDGMENT.

A judgment in Ohio, has relation to the first day of the term, and from that day constitutes a lien on the lands of the defendant, which lie within the jurisdiction of the court. *Ex dem. Sturges v. Bank of Cleveland*, 140.

A warrant of attorney to confess a judgment, the defendant being insolvent, executed within two months preceding the filing of the petition by the bankrupt, is void. *M'Lean, assignee, v. Bank of Lafayette*, 185.

The judgment being invalid, all the proceedings under it are fraudulent and void. *Ib.*

All judgments at the same term under the Ohio statute, have an equal lien, provided execution be issued and levied within a year. *M'Lean, assignee, v. Rocky*, 235.

Judgment will not be arrested, if the instrument declared on shows a valuable consideration. *Kemble v. Lull*, 272.

A failure to give security for costs, under the general rule of the court, no cause for setting aside a judgment. *Lytle v. Denham*, 411.

Nor is the misapprehension of counsel a ground for doing so under ordinary circumstances. *Ib.*

A judgment against the casual ejector may be set aside, for good cause, after the term. *Ib.*

The tenants should be named in the notice, and it should be served on them. *Ib.*

JURISDICTION.

Jurisdiction is taken from the damages laid in the writ and declaration, and not from the amount due, as proved on the trial. *Sherman v. Clark*, 91.

In all cases arising under the bankrupt law, the circuit court has concurrent jurisdiction with the district court. *M'Lean, assignee, v. Bank of Lafayette*, 185.

The circuit court has jurisdiction in all cases where a suit is brought by the assignee of a bankrupt or against him. *Ib.*

The state courts have not jurisdiction, and Congress have not power to vest them with jurisdiction, to carry out the bankrupt law. *Ib.*

A state court, by the enforcement of a lien, cannot draw to its jurisdiction the administration of the bankrupt law. *Ib.*

JURISDICTION—Continued.

To prevent this effect, the circuit court may issue an injunction. *Ib.*

An assignment void under the bankrupt law, the circuit court has jurisdiction to say so, and to distribute the assets. *M'Lean, assignee, v. Malina*, 199.

The assignee of a mortgage may file a bill of foreclosure in the federal court, though his assignor could not have done so. *Dundas v. Bowler*, 204.

Such a bill acts upon the land as directly as an action of ejectment. *Ib.*

An ejectment may be brought by the assignee of a mortgage, and the jurisdiction of the court cannot be doubted. *Ib.*

The restriction of the eleventh section of the act of 1789, seems to have been designed to act upon negotiable paper. *Ib.*

Where there is no allegation of fraud in the bill, and the liens will more than absorb the property of the bankrupt, there is no reason why this court should take jurisdiction. *M'Lean, assignee, v. Rockey*, 235.

In Ohio, the Court of Common Pleas have power to take jurisdiction of a bill for partition in two counties. *Nelson v. Moon*, 319.

But, to affect purchasers, the decree must be recorded in the county where the land lies. *Ib.*

An assignee in bankruptcy has a right to file his bill against different mortgages to test the validity of their mortgages. *M'Lean, assignee, v. Mahard*, 415.

The assignee represents the creditors. *Ib.*

The court has no jurisdiction to enforce a contract respecting a patent right, where the parties live in the same state. *Brooks v. Stolley*, 523.

But where a contract of license is abandoned, the party who holds the right may restrain the individual from infringing his right. *Ib.*

Jurisdiction being acquired on a bill to restrain the defendant from an infringement of a patent right, the court may settle between the parties other collateral matters. *Ib.*

When a party voluntarily submits to the jurisdiction of the court, it may go on and decide the matter appertaining to the controversy. *M'Lean, assignee, v. Bank of Lafayette*, 587.

A decree, in Ohio, for land out of the state, cannot operate as a conveyance, as in it; but, having jurisdiction of the person, a decree may be enforced. *Ib.*

JURY.

A demand for a trial by jury, where an application for the benefit of the bankrupt law is dismissed, must be made at the term at which the decision is made. *In the matter of Hunter*, 297.

LANDS, PUBLIC, RESERVED—See Salt Springs.

Lands purchased or taken by the government for debts, may be sold by it. *United States v. Hudson*, 156.

Lapse of time. Letter of Credit. Lex loci. License. Lien.

LAPSE OF TIME.

Lapse of time will operate as a bar against a non-resident, under certain circumstances, although the statute does not run against him. *Lewis v. Baird*, 56.

A delay of payment for two years, under circumstances where the vendor receives no damage which interest will not compensate, will not bar a bill for a specific execution of the contract. *Mason v. Wallace*, 148.

A purchaser of land, to be paid in work, who enters into possession, but never performs the work, cannot set up lapse of time to protect him. *Stansbury v. Taggart*, 457.

A possession under such a purchase, without deed, cannot, by lapse of time, ripen into a title. *Ib.*

The purchaser's possession is the possession of the vendor. *Ib.*

LETTER OF CREDIT.

A letter of credit to a particular firm, and which guaranties the payment, will not bind the guarantor, if the purchase be made of other persons. *Bleeker v. Hyde*, 279.

Such a contract is not to be extended beyond the manifest intention of the parties. *Ib.*

LEX LOCI.

The lex loci governs the contract of indorsement of a negotiable note. *M'Clintock v. Cummins*, 158.

LICENSE.

A conditional license to use a patented machine, cannot be set up as an excuse or justification on a charge of infringement, unless the defendant aver and show that he has performed the conditions on his part. *Brooks v. Stolley*, 523.

LIEN.

A judgment in Ohio is a lien, from the first day of the term. *Ex dem. Sturges v. Bank of Cleveland*, 140.

A mortgage under the act of 1831, takes effect only from the time it is left for record. *Ib.*

The mortgage first recorded will create a paramount lien to one of prior date, which has not been recorded. *Ib.*

The peculiar provisions of the statute would seem to preclude an equitable mortgage. *Ib.*

Under the bankrupt law, bona fide liens under the state law are valid. *M'Lean, assignee, v. Bank of Lafayette*, 185.

Fraud vitiates such liens. *Ib.*

A judgment is a lien within the law. *Ib.*

A judgment binds the real estate of defendant from the first day of the term. *M'Lean, assignee, v. Rockey*, 235.

LIEN—Continued.

A permanent leasehold estate, from the construction of the Ohio statute by the Supreme Court of the state, is bound by a judgment, as real estate. *Ib.*

Where a creditor's bill, to subject equitable rights of a judgment debtor, was served before the petition in bankruptcy was filed, it creates a lien under the bankrupt law. *Clarke, assignee, v. Rist*, 494.

A judgment discharged cannot be resuscitated so as to be a lien upon the property of third persons. *M'Lean, assignee, v. Bank of Lafayette*, 587.

LIMITATION, STATUTES OF—

The statute of limitations is the law of the forum. *Egbert v. Dibble*, 86.

The act of Congress of 1790, limiting the prosecution of certain offenders to two years, applies to statutes subsequently passed. *Johnson v. United States*, 89.

Where there is a bar under the statute, it should be pleaded. *Ib.*

The thirty-first section of the act of Congress, of 30th April, 1790, applies to offences committed after, as well as before, the act. *United States v. Ballard*, 469.

The indictment or information must be found within the limitation of the statute. *Ib.*

An indictment within two years, on which a nolle prosequi was entered, cannot save the statute. *Ib.*

The second indictment had no connection with the first. *Ib.*

A surety of a postmaster must be sued in two years after the defalcation occurs. *United States v. Davis*, 483.

The act of limitation of Illinois, of 1827, bars certain claims not presented in sixteen years, but did not operate against non-residents; but this exemption was repealed by the act of 1837—held that on a claim which had six years to run, the statute would run. *Lewis v. Broadwell*, 568.

To bar any claim there must be a reasonable time for the statute to run after it is enacted. *Ib.*

Until administration granted, it is doubtful whether the statute can operate, as there is no one against whom suit could be brought. *Ib.*

MARSHAL.

A marshal of the United States is bound to pay over to his deputies and assistants, in taking the census, the same funds, or their equivalent, which he may have received from the government. *United States v. Patterson*, 53.

And if he pay less, he is liable to the penalty of five hundred dollars, under the act of the 3d March, 1839. *Ib.*

A sale of treasury notes by the marshal for currency, at eight per cent. premium, and a payment of his deputy in such currency, is a violation of the law. *Ib.*

Marshal. Mortgage. Motion. Non-Suit. Notary.

MARSHAL—Continued.

The deputy of the marshal is a sworn officer known to the law, and he may return as deputy process served by him. *Spafford v. Goodall*, 97.

A marshal's sale of land on execution, where the defendant had no interest in the land, will be set aside on motion. *Rocksell v. Allen*, 357.

The deputy of a marshal is liable to be attached for not paying over money received by him. *Bagley v. Yates*, 465.

MORTGAGE.

A prior mortgagee has a right to release his claim on the payment of his debt, unless he have actual notice of the claims of subsequent mortgagees. *M'Lean, assignee, v. Bank of Lafayette*, 587.

This notice cannot be implied by recording the subsequent mortgages, but it must be a notice in fact. *Ib.*

A junior mortgagee has a right to pay off the prior mortgage, and claim under it. *Ib.*

MOTION.

A writ, by virtue of which a bail bond was taken, will not be set aside on motion, after judgment in the original action and suit on the bond. *Hall v. Singer et al.*, 17.

A motion to produce a paper in the possession of the plaintiff, which is necessary to enable the defendants to plead, may be granted in the discretion of the court, although no notice has been given. *Bronson v. Kensey*, 180.

A decree irregularly obtained, will be set aside on motion. *Treadwell v. Cleveland*, 283.

A demise in the name of a dead man, will not be stricken out on motion. *Ex dem. Baylor v. Neff*, 303.

And so if the lessor of the plaintiff be dead at the commencement of the suit. *Ib.*

A judgment of a previous term cannot be set aside on motion. *Brusk v. Robbins*, 486.

The court will not dismiss an action of ejectment, when the lessor of the plaintiff is living, though he be insane. *Gilleland v. Martin*, 490.

If the lessor be a lunatic, the action is well brought in his name. *Ib.*

NON-SUIT.

If the proof do not agree with the bill of particulars furnished, a non-suit must be the consequence. *Williams v. Sinclair*, 289.

A non-suit will be set aside where justice requires it. *Ib.*

NOTARY.

The clerk of a notary, strictly, is not authorised to present a bill for payment. *Sacridier v. Brown*, 481.

NOTARY—Continued.

In London and Liverpool, under a long established usage, the clerk makes a demand. *Ib.*

The protest must be made by the notary. *Ib.*

NOTICE.

The recording a deed, which conveys an equity only, is not notice. *Lewis v. Baird*, 56.

A record of a deed in Kentucky, for lands in Ohio, is no notice to a subsequent purchaser. *Ib.*

The recording of a copy of a deed cannot be notice. *Ib.*

A notice of demand and protest of non-payment of a note to the indorser, is good, if directed to a post office where the party is in the practice of receiving his letters, though it may not be the nearest post office to his residence. *Sherman v. Clarke*, 91.

A personal notice of the demand and refusal to pay a note, may be given to the indorser at any place. *Hyslop v. Jones*, 96.

Where an indorser lives in a city, the notice must be served personally, or left at his residence, or place of business. *Ib.*

A deposit of the notice in the post office is not sufficient, without the indorser received it. *Ib.*

Where a note or bill is drawn by a member of a firm, to pay his individual debt, and he accepts the bill, and before due it is negotiated without notice, payment may be enforced. *Babcock v. Stone*, 172.

But where the possession of a paper is desired to be used in evidence, a notice is necessary. *Ib.*

Regularly a notice should be served on infants, where the court appoint a guardian ad litem, and for this defect a decree or a judgment may be reversed. *Ib.*

But this objection cannot be taken collaterally. *Ib.*

A purchaser of land, with full notice of certain claims, and receives a deed, cannot withhold the purchase money on account of such claims. *Stanbury v. Taggart*, 457.

He must seek redress on the warranty, should he suffer damage. *Ib.*

A notice of a demand of payment and protest of a note, bearing the signature of the notary, is good, and the court will not presume that it was signed in blank. *Browning v. Andrews*, 576.

A notice of taking depositions, left at the lodgings of the party, the place not being named, is not sufficient. *Hill v. Norvell and Crary*, 583.

A notice to an indorser, who is a member of the Senate of the United States, left in the post office of the Senate, is not sufficient. *Ib.*

And so of the House of Representatives. *Ib.*

But if the jury believe, from the evidence, that the notice was received, it is sufficient. *Ib.*

 Ordinance of 1787. Parties. Partners.

ORDINANCE OF 1787.

Does not prevent the improvement of navigable water courses. *Palmer v. Commissioners of Cuyahaga County*, 226.

No state can obstruct navigable streams extending to other states. *Ib.*

The western reserve in Ohio, subject to the ordinance. *Ib.*

The Constitution of the Union and act of 1793, in regard to the surrender of a fugitive from labor, is binding on the state of Indiana, and its citizens, the same as on the other states. *Ib.*

A repugnancy between the compact, in the ordinance of 1787 and the state constitution, necessarily repeals the ordinance. *Ib.*

Indiana, by coming into the Union consents to this. *Ib.*

PARTIES.

Parties in chancery or at law, may waive process and appear. *Nelson v. Moore*, 319.

Under certain circumstances, a suit may be prosecuted by the drawer of a bill of exchange in the name of the payees for the benefit of the drawer. *Davis & Co. v. M'Connel*, 391.

In such a case, payment of the bill by the drawer, is no bar. *Ib.*

The drawer having paid the bill to the payees, after the acceptors refused to pay it, had a right to sue the acceptors. *Ib.*

After an act of bankruptcy, suit cannot be brought in the name of the bankrupt. *Cook v. Lansing*, 571.

PARTNERS.

An acting partner of a mercantile establishment may transfer its funds. *Piatt v. Oliver and Williams*, 27.

Real estate purchased by the partnership, is liable for its debts. *Ib.*

But the acting partner cannot transfer the real estate of the partnership. *Ib.*

In chancery such real estate is considered as personal property. *Ib.*

On the death of a partner, his interest in the real estate descends to his heirs. *Ib.*

A partner failing to pay his share of the partnership fund, does not forfeit his interest in the partnership. *Ib.*

A, being a partner in two firms, draws a bill by one firm on the other, payable to himself, for his individual debt, and accepted by such firm, cannot be recovered by the payee against the drawers or acceptors. *Babcock v. Stone et al.*, 172.

Where men associate in partnership, they give credit to each other, and they should bear the loss. *Ib.*

On this ground, a partner may bind his partners, though his act be a fraud on the firm. *Ib.*

After the dissolution of a partnership, one partner has no power to bind the late firm, by giving a note for a partnership debt. *Draper v. Bissel*, 275.

It is otherwise, if a partner be authorised. *Ib.*

PARTNERS—Continued.

In England the rule is different. Ib.

But if the other partner promises to pay, it is sufficient. Ib.

An individual who holds himself out to the world as a partner, should be held responsible as such, though in fact he be not a partner. *Buckingham v. Burgess*, 364.

An agreement by one partner, that a certain note should be paid, by a transfer of debts, which is done, though no credit is entered, will be enforced. *Gwathney v. M'Lane*, 371.

The assignment of the note after it became due, in violation of the agreement, would not prevent the partner from making this defence. Ib.

PATENT RIGHTS.

If a patentee claims more than he has invented, his patent is not void, as under the former law, but so far as his invention goes he is protected. *Peterson v. Wooden*, 248.

But where the patent is for the improvement of a machine, the patentee must show in what the improvement consists. Ib.

If a patentee be dead, his administrator may renew the patent. *Brooks & Morris v. Jenkins et al.*, 250.

The board on whose judgment a patent is renewed, is not conclusive as to the right. Ib.

The specifications of an improvement of a machine, must be so clear as to enable a person acquainted with the structure of such a machine to build one. Ib.

Where witnesses differ as to the fact of an infringement, an issue should be directed, or an action at law commenced. Ib.

A difference in form or proportions only, makes no difference in the principle of a machine. Ib.

A patent is invalid, if described in a foreign publication. Ib.

The exclusive grant in a patent, is the construction and use of the thing patented. *Boyd v. Brown*, 295.

Where the right consists in certain instruments, by which a bedstead of a particular structure is made, the structure or use of these instruments is prohibited. Ib.

A patentee of a flouring mill of a certain structure, has an exclusive right to make and use such mill, but he can claim no monopoly in the sale of the flour he manufactures. Ib.

Under the act of 1836, the patentee may assign any part of his right. *Boyd v. M'Alpen*, 427.

The assignment must be recorded. Ib.

If not recorded, a subsequent assignee, without notice, would hold. Ib.

The sale of the product of a patented machine is not an infringement of the right. Ib.

But if the person who sells is connected with the use of the machine, it may be an infringement. Ib.

 Patent Rights. Pleadings.

PATENT RIGHTS—Continued,

The thing invented must be accurately described. *Ib.*

Woodworth's right consists of a combination of known mechanical powers. *Ib.*

The use of any part of these, less than the whole, is no infringement. *Ib.*

Where more is claimed than is invented, a disclaimer must be made in a reasonable time. *Ib.*

If the thing claimed to have been invented, has been before made, or described in any public work, the patent is void. *Ib.*

The principle of a machine depends upon its peculiar structure, by which a certain effect is produced. *Ib.*

Where license to run a machine patented has been abandoned, the holder of the right may file his bill to enjoin the defendant. *Brook v. Stolley*, 523.

The license being conditional, if set up by the defendant, he must show a performance of the conditions on his part. *Ib.*

A patent right is infringed, by making the thing patented, though employed by another to do so. *Boyce v. Dorr*, 582.

But where the thing was made without the knowledge of its having been patented, more than nominal damages should not be given. *Ib.*

PLEADINGS.

A plea cannot contradict the record. *Hall v. Singer et al.*, 17.

To take advantage of a defect in the writ, Oyer must be pleaded. *Ib.*

In an action against the assignor, the declaration must allege a demand on the drawer of the note when it became due. *January v. Duncan*, 19.

For chancery pleading, see Chancery.

A demurrer extends to the first error in pleading. *Egbert v. Dibble*, 86.

The statute of limitations of the state where the suit is brought, must be pleaded. *Ib.*

It is the law of the forum. *Ib.*

Inducement should consist of such facts as authorise an inference against the right asserted by the other party. *Ib.*

Where there is a bar under the statute of limitations, it should be pleaded. *Johnson v. The United States*, 89.

A plea that the defendant paid the note to the assignor, before he had notice of the assignment, cannot be sustained against the assignee. *Patterson v. Atherton*, 147.

The plea should aver that the payment was made before the note was assigned, or before it was due. *Ib.*

The balance averred to have been paid to the plaintiff, does not appear to have been received by him in discharge of the note. *Ib.*

Duress cannot be pleaded by a stranger. *McClintick v. Cummins*, 158.

A rejoinder must answer the replication. *United States v. Cumpton*, 163.

It must tender an issue on a single point. *Ib.*

Pleadings.

PLEADINGS—*Continued.*

If double, it is demurrable. *Ib.*

The plea of nil debit is improper, where the action is founded on a deed. *Ib.*

If the deed be only inducement to the action, the plea is proper. *Ib.*

An averment, that the note was assigned on the day, or at the time of its execution, is sufficient. *Silver v. Henderson*, 165.

Where an action is brought against two, as the survivors of one, it is not essential to allege that the note had not been paid by the deceased. *Ib.*

A plea which admits the execution of the instrument, and sets up matter in avoidance, is not objectionable as amounting to the general issue. *Thomas v. Page*, 167.

The bank of Missouri having bills to the amount of one hundred thousand dollars of the bank of Illinois, the latter bank agreed to draw drafts on New York for the amount, and leave its bills in the hands of a third party as collateral security, and also to place ten thousand dollars in addition in bills to cover damages of protest. The bills were protested, and suit brought against the bank of Illinois on the protested bills; the above agreement cannot be pleaded in bar of the action. *Stickney v. Bank of Illinois*, 181.

Nor can an agreement, should the drafts be protested, to deliver an amount of the said bills to cover the damages, be so pleaded. *Ib.*

The pendency of a suit between the same parties, and respecting the same subject matter, in another state, may be pleaded in abatement. *Ex parte Balch*, 221.

But such plea must show that the court has jurisdiction. *Ib.*

Certain things are necessary to give jurisdiction to a proceeding in bankruptcy, and these must be stated. *Ib.*

The rules of pleading are the same in civil and criminal cases. *United States v. Brown*, 233.

A demurrer to the declaration raises the question of law, whether the plaintiff, from the facts stated, is entitled to recover. *Hobson v. McArthur*, 241.

Matter of evidence should not be pleaded. *Ib.*

If a deed be partially stated, the defendant may crave Oyer, and demur. *Ib.*

Bankruptcy should be pleaded at law and in equity. *Fellows v. Hall*, 281.

Until this is done, the plaintiff has no notice of the bankruptcy. *Ib.*

The defendant may waive his discharge. *Ib.*

A plea to an action against the directors of a bank, under the Michigan act of 1837, which makes them personally liable where the bank is insolvent, &c., which avers that the notes, on which the action is brought, were fraudulently put into circulation, is no answer to the declaration. *White v. How*, 291.

The plaintiff must be connected with the fraud, or at least have had notice of it. *Ib.*

A bank is answerable for the acts of its agents; and it is immaterial how

PLEADINGS—Continued.

notes get into circulation, if they come into the hands of the holder, bona fide. *Ib.*

That plea is defective, which, admitting its averments to be true, does not constitute a bar to the action. *Ib.*

A plea of bankruptcy, which sets out the certificate and discharge, as required in the 4th section, is good. *Ib.*

A plea which does not traverse the facts averred in the declaration, but sets up new matter in defence, admits the case made in the declaration.

Greathouse v. Dunlap, 303.

So a demurrer to the plea admits all the facts of the plea which are well pleaded. *Ib.*

Want of consideration, on general principles, cannot be pleaded to a bond; nor fraud, except to the execution of the instrument. *Ib.*

But under the statute in Ohio, both of these defences to a sealed instrument may be made. *Ib.*

To an action on a bond to pay what might be recovered in an action then pending, a defence which might have availed in that action, cannot be set up. *Ib.*

Bail cannot go behind the judgment. It is as conclusive against them as against the defendant. *Ib.*

Every plea in avoidance of a bond should particularise the matters of avoidance. *Ib.*

A defendant may set up under the general issue, that the plaintiff is one of a partnership, and is indebted to him, it being the same transaction.

Buckingham v. Burgess, 264.

Defendant cannot plead, as against the assignee of a note, a secret agreement between the original parties, that the note was to become void, if certain bills of exchange should not be paid. *Thomas v. Page*, 369.

A plea, that another note was to be applied to the note, is not good, unless it avers that such note was received in payment, or that the receipts were received. *Homas v. McConnell*, 381.

A plea to an action on a note, that the goods purchased, for which the note was given, are of no value to defendant, is not good. *Christy v. Cummins*, 386.

In the exercise of their discretion, the court will not give leave to file the plea of the statute of limitation, out of time, where there is no pretence of merits. *Reed and Mix v. Clark*, 480.

POSSESSION.

Where possession has been taken of property purchased and valuable improvements made, the acquiescence of the vendor may be presumed. 148.

A stranger who obtains possession through a tenant, though by purchase of the land, cannot dispute the landlord's title. *Lockwood v. Walker*, 431.

Process. Promissory Note. Remedy. Salt Springs. Set Off.

POWER OF ATTORNEY—*See Fugitives from Labor.*

PRINCIPAL AND SURETY—*See Surety.*

PROCESS.

The process on the defendant in chancery must be served, in Michigan, twenty days before the defendant is bound to appear. *Treadwell v. Cleveland*, 283.

PROMISSORY NOTE.

A promissory note for a certain sum payable in current bank notes, is not negotiable. *Fry v. Rosseau*, 106.

Where a bank is prohibited by law from issuing any bill or note not payable on demand and without interest, under a penalty, any instrument issued in violation of the act is void. *Hayden v. Davis*, 276.

An acceptance of a draft is within the law. *Ib.*

REMEDY.

The circuit courts of the United States adopt the local remedies of the respective states. *Strachan v. Clyburn*, 174.

A legislature may create a new remedy, where equity requires, applicable to past transactions. *Milne v. Huber*, 212.

A contract made in Pennsylvania, and sued on in Indiana, in regard to the remedy, cannot be governed by the laws of Pennsylvania. *Smith v. Atwood*, 545.

The law of the contract accompanies it, and must govern it; but that relates to the rights and obligations of the parties, and not to the remedy. *Ib.*

SALT SPRINGS.

Under the act of 19th April, 1816, lands reserved for salt springs, within the limits of Indiana, were vested in the state. *Indiana v. Miller*, 151.

The above act limited the grant to thirty-six entire sections. *Ib.*

In 1831, a patent was issued for certain land claimed by the state, as coming within the grant of the act of 1816, as containing a salt spring. *Ib.*

This reserve, not having been so entered on the record at Washington, or at the land office in Cincinnati, and not coming within the thirty-six sections conveyed to the state, held to be vested in the patentee. *Ib.*

A salt lick or spring, are words used as synonymous in the act of Congress. *Ib.*

SET OFF.

Property received collaterally, and not in payment of a note, cannot be pleaded as a set off.

Unliquidated damages cannot be so pleaded: *Thomas v. McConnel*, 381.

Sheriff. Slavery. Stage Proprietor. Statute.

SHERIFF.

In an action for an escape, the sheriff cannot take advantage of an irregularity in the process, which does not render it void. *Spafford v. Goodell*, 97.
 A sheriff who receives, as jailer, a person arrested by the marshal, is bound to keep the prisoner under all the responsibilities, as if he had been arrested under state process. *Ib.*

An escape on final process, subjects the sheriff to damages to the amount of the injury received by the plaintiff. *Ib.*

Where the defendant was wholly without property, nominal damages, only, can be recovered against the sheriff. *Ib.*

The sheriff, where property is levied on, is the agent of both parties. *Starr v. Moore*, 354.

But if the property be lost without the negligence of the sheriff, the defendant sustains the loss. *Ib.*

If the sheriff be in fault, the plaintiff must look to him. *Ib.*

SLAVERY.

Courts are not to discuss slavery in the abstract, or the policy of slave laws. *Vaughan v. Williams*, 530.

The owner of slaves who takes them to the state of Illinois, and keeps them at labor six months, and then removes them to Missouri, forfeits his right to them as slaves. *Ib.*

STAGE PROPRIETOR.

A stage proprietor is responsible for the skill and prudence of his drivers. *Peck and Wife v. Neil*, 22.

He is also bound to have good stages, harness, and well broke horses. *Ib.*

Although the injury may have been done by the recklessness of the driver of another stage who may be liable, and also his employers, yet if the injury be chargeable, in any respect, to a want of skill or care in the driver of the stage run against, his principal is liable. *Ib.*

Where the driver has been reckless, exemplary damages should be given. *Ib.*

STATUTE.

An act, repugnant to a prior act, repeals it. *Milne v. Huber*, 212.

But the repeal of the last act does not revive the former one. *Ib.*

This holds, whether the repealing act is express, or by reason of its repugnancy. *Ib.*

The repeal of a prohibitory act, does not make void contracts against law. *Ib.*

A statute may remedy a formal defect in the acknowledgment of deeds. *Raverty and Wife v. Fridge et al.*, 230.

The safety fund law, in Michigan, which prohibited all banks subsequently established from issuing notes, except they are payable on demand and without interest, applies to a bank charter granted on the same day. *Weed v. Snow*, 265.

And, where notes are issued in violation of such law, they are void. *Ib.*

Statute. Surety. Surplusage. Survey. Tax.

STATUTE—Continued.

Any instrument in violation of the law is void. *Hayden v. Davis*, 276.

A printed statute may be corrected by the enrolled bill filed in the department of state. *Reed & Mix v. Clark*, 480.

In England, a general statute does not embrace the king, unless specially named. *United States v. Davis*, 483.

The statute of limitation does not bind the government, unless it be specially named. *Ib.*

SURETY.

The sureties of a receiver of public moneys are responsible for any neglect of the receiver, which appertains to the duties of his office. *United States v. Wann*, 179.

But the government cannot pay an extravagant sum for the performance of the labor neglected by the receiver, and charge his sureties with such sum. *Ib.*

The government, in such case, is entitled to recover what shall be a reasonable compensation for the labor performed. *Ib.*

The surety of a postmaster is entitled to a discharge under the bankrupt law. *United States v. Davis*, 483.

A surety cannot claim the assignment of the instrument signed by him from his principal on paying it off; but he may claim all collaterals which the principal held. *M'Lean, assignee, v. Bank of Lafayette*, 587.

A co-surety has a right to require that property, given to indemnify one, shall be sold for the benefit of both. *Ib.*

But this cannot be done, where the surety who holds the indemnity is not liable. *Ib.*

SURPLUSAGE.

An averment in the declaration that the note, when due, was presented to the bank for payment, to wit: 23d of July, 1841; the words from "to wit," were held to be surplusage. *Hyslop v. Jones*, 96.

SURVEY.

A survey, after the entry is withdrawn, does not, under the act of Congress of 1807, prevent the location of the land surveyed, by another warrant. *Ex dem. Gault v. M'Millan*, 20.

The act refers to a subsisting survey, which must be founded on an entry. *Ib.*

A survey made without an entry is of no validity. *Ib.*

TAX.

Land purchased from the United States and paid for, is liable to be taxed in Michigan. *Astrom v. Hammond, Auditor*, 107.

And this applies to estates, legal and equitable. *Ib.*

TITLE.

The ordinance of 1787 regulated the form of conveyance of real estate. *Lewis v. Baird*, 56.

An equity may be transferred in any form not prohibited by law. *Ib.*

Though an equity be conveyed, under the forms of a legal right, it does not change the title. *Ib.*

The recording of a deed, conveying an equity only, is not notice. *Ib.*

No greater interest can be conveyed by a grantor than is vested in him. *Ib.*

A deed executed by an executor under a will, before the emanation of the patent, can convey no title. *Ib.*

But, if the patent issue in the name of the executor, it operates in favor of the prior conveyance, by way of estoppel. *Ib.*

A deed is said, without much reason, to be construed most strongly against the grantor. *Ib.*

A title acquired after the date of the demise, cannot sustain the action. *Ex dem. Baylor v. Neff*, 302.

Where a tract of land is lost in whole or part, the patent may be canceled under the act of Congress. *Nelson v. Moon*, 319.

A patent for land covered by a paramount title does not vest the fee in the patentee. *Ib.*

A deed by the defendant, under a decree, conveys a good title, without proof of the decree. *Tardy v. Morgan*, 358.

A deed not acknowledged, as between the parties, is good in Indiana to convey the title. *Ex dem. Strong v. Smith*, 362.

But such deed, if recorded, is not notice. *Ib.*

TREASURY WARRANT.

The validity of the act of 1820, which authorises the agent of the treasury to issue a distress warrant against a defaulting officer and his sureties, may well be doubted. *United States v. Taylor*, 539.

The right of trial by jury is disregarded, and the judicial functions are required to be exercised by the agent of the treasury. *Ib.*

TRESPASS.

In trespass for digging and carrying away lead ore from the lands of the United States, they are not entitled to recover, as damages, the value of the ore after it is dug. *United States v. Magoon*, 171.

The injury done the soil is the gist of the action; and ore extracted must be considered in aggravation of the damages. *Ib.*

A trespasser is not placed on the same footing as a lessee. *Ib.*

A permit to enter on lands containing lead ore, may be shown to explain the nature of the entry. *United States v. Gier*, 571.

A final receipt for the ore used, by an authorised officer of the government, is a discharge, though the money, by the officer, has never been accounted for. *Ib.*

TRUSTEE.

Where a trustee disposes of the trust property, the cestui que trust may claim the thing received, if it can be identified. *Piatt v. Oliver and Williams*, 27.

A trustee may convey his own interest, though the assignment may not convey the interest of his cestui que trust. *Ib.*

A trustee is presumed to act for the benefit of his cestui que trust. *Lewis v. Bird*, 56.

USAGE.

Usage as to the form of deeds cannot be disregarded. *Kirkendall v. Mitchell*, 144.

USURY.

A mortgage given to secure the payment of an usurious note, the usury not being purged, is infected, and subject to the same rule as the note. *Morgan et al. v. Tipton et al.*, 339.

In Indiana usury makes void the instrument. *Ib.*

If the holder of an usurious note, not known to be usurious by him when received, yet have a knowledge of the usury before the mortgage was taken, it makes void the mortgage. *Ib.*

Even without notice the mortgage is void. *Ib.*

The purchase of a bill of exchange is never usurious. *M'Lean, assignee, v. Mahard*, 587.

But the bill must be complete. *Ib.*

The rate of exchange on foreign bills is a fact, to be ascertained by evidence, and to sell at the established rate is not usurious. *Ib.*

If a bill be discounted, and the per cent. charged be used as a device to cover usury, the act is usurious. *Ib.*

The rate of exchange may be influenced by the currency which is made the basis of exchange. *Ib.*

By the construction of the general law against usury, it makes void the instrument only for the surplus. *Ib.*

Where the same words substantially are embodied in a bank charter, a different effect should not be given to them. *Ib.*

VARIANCE.

Any variance between the judgment described in the declaration, from that of the record, will exclude the record from being received as evidence. *Swydam, Sage & Co. v. Aldrich*, 383.

A slight and an unsubstantial variance between the indictment and the proof, in regard to the direction of a letter, not produced, and which the witness states, after the lapse of two years, with doubt, ought not to exclude the evidence. *United States v. Burroughs*, 405.

WAGER.

At common law, a wager fairly made was recoverable. *Grant v. Hamilton*, 100.

Lapse of time. Letter of Credit. Lex loci. License. Lien.

WAGER—Continued.

If the money was paid, it could not be recovered back again. *Ib.*

But under the statute of Michigan, money lost at play, or on a horse race, &c., may be recovered. *Ib.*

Under this statute an action may be maintained in the Circuit Court. *Ib.*

WAREHOUSE RECEIPT.

A receipt by a warehouseman, of property to be forwarded and of payment, when assigned to a commission merchant in New York, who makes an advance, does not create a lien on the property, paramount to that of an attachment laid before notice of the assignment. *Gibson v. Stevens*, 551.

WARRANTY.

The warranty of the ancestor does not bind the heir, unless the right vests in the ancestor during life. *Piatt v. Oliver and Williams*, 27.

A warranty with assets does bind the heir. *Ib.*

A man cannot bind his heirs to pay a sum of money, unless he is himself bound to pay it. *Ib.*

The old form of warranty, if not in form, in effect, has been superseded by covenants real. *Ib.*

A warranty is limited by the nature of the estate. *Lewis v. Beird*, 56.

It must have an estate on which to operate. *Ib.*

Where a deed conveys title, a warranty can never operate by way of estoppel. *Ib.*

In a deed of general warranty it is not necessary to use the word warrant, if other words of equal import shall be used. *Kirkendall v. Mitchell*, 144.

Under a covenant to convey a certain tract by a general warranty deed, with the fee simple annexed, a covenant of seisin is not essential. *Ib.*

On a sale of land on execution there is no warranty. *Rocksell v. Allen*, 357.

WITNESS.

An informer is a competent witness, although he may receive a part of the penalty. *United States v. Patterson*, 53.

This rule is founded on necessity and policy. *Ib.*

A witness to be competent, must believe in God, and in rewards and punishments. *United States v. Kenedy*, 175.

If these be inflicted in this life, he is competent. *Ib.*

But his credibility is with the jury. *Ib.*

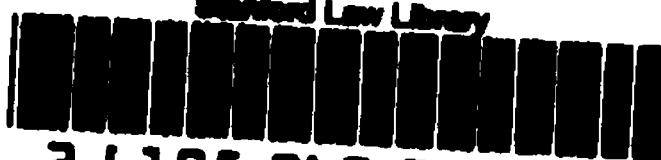
An accomplice is a competent witness. *United States v. Troax*, 224.

A witness may be competent to prove some facts, and incompetent to prove others. *Wright, assignee, v. Foster*, 229.

The bankrupt is a competent witness where the assignee is a party. *Ib.*

The wife is not a competent witness to prove that her husband is living, on a motion to dismiss a suit. *Gilleland v. Martin*, 490.

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